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10	Attorneys for Defendants	
11	Matthew Katzer and Kamind Associates, Inc.	
12	UNITED STATES DISTRICT COURT	
13	NORTHERN DISTRICT OF CALIFORNIA	
14	SAN FRANCISCO DIVISION	
15	DODEDE IA CODGEN	Case Number C06-1905-JSW
16	ROBERT JACOBSEN, an individual,) Hearing Date: October 30, 2009
17	Plaintiff,	Hearing Time: 9:00am Place: Ct. 11, Floor 19
	VS.	Hon. Jeffrey S. White
18		
19	MATTHEW KATZER, an individual, and KAMIND ASSOCIATES, INC., an Oregon	DEFENDANTS MATTHEW KATZER AND KAMIND
20	corporation dba KAM Industries,	ASSOCIATES, INC.'S MOTION FOR LEAVE TO FILE FIRST
21	Defendants.	SUPPLEMENTAL COUNTERCLAIM [FED. R. CIV. P.
22) 15(D)]
23	NOTICE	
24	To the court and all interested parties, please take notice that a hearing on Defendants	
25	Matthew Katzer and Kamind Associates, Inc.'s Motion for leave to file first supplemental	
26		
	Case Number C 06 1905 JSW	
	Defendants' Motion to File First Supplemental Counterclaim	

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counterclaim will be held on October 30, 2009 at 9:00 a.m. in Courtroom 11, Floor 19, of the above-entitled court located at 450 Golden Gate Avenue, San Francisco, California.

MOTION

Defendants Matthew Katzer and Kamind Associates, Inc. (collectively "KAM") move the court for leave to file a first supplemental counterclaim pursuant to Fed. R. Civ. P. 15(d).

STATEMENT OF ISSUES TO BE DECIDED

1. Whether good cause exists to grant Defendants leave to file a first supplemental counterclaim.

STATEMENT OF RELEVANT FACTS

Defendants existing counterclaim against Plaintiff alleges that Plaintiff is infringing on Version 3.0 of the National Model Railroad Association Digital Command Control Reference Manual for QSI Quantum HO Equipped Locomotives (QSI Manual). In 2006, KAM purchased from QSI Industries, Inc. all right, title and interest in and to Version 3.0 of the QSI Manual as discussed in Defendants existing counterclaim. In 2008, KAM purchased from QS Industries all right, title and interest to all versions of the QSI Manual. Declaration of Matthew Katzer, ¶ 3. On February 11, 2009 Defendants filed their existing counterclaim with their answer [Dkt.#290]. During the discovery process in this case, Defendants have discovered that Plaintiff's software infringes on Versions 4.02, 4.1, 4.3 and 4.4 of the QSI Manual as well as Version 3.0. Declaration of Matthew Katzer, ¶ 4. KAM was unaware at the time of filing its original counterclaim that Plaintiff's software infringed on Versions 4.02, 4.1, 4.3 and 4.4. of the QSI Manual. Declaration of Matthew Katzer, ¶ 5. KAM registered its copyright rights with the United States Copyright Office for Version 4.02 and obtained Copyright Registration Number TX 6-888-840 on November 7, 2008. Declaration of Matthew Katzer, ¶ 6. KAM registered its copyright rights with the United States Copyright Office for Version 4.1 on August 5, 2009 and this registration is still pending. Declaration of Matthew Katzer, ¶ 7. KAM registered its copyright rights with the United States Copyright Office for Version 4.3 on April 28, 2009 and

this registration is still pending. Declaration of Matthew Katzer, ¶ 8. KAM registered its copyright rights with the United States Copyright Office for Version 4.4 on August 4, 2009 and this registration is still pending. Declaration of Matthew Katzer, ¶ 9.

Defendants conferred with Plaintiff's counsel on this motion and Plaintiff's counsel refused to either consent to or oppose this motion.

ARGUMENT

1. Standard of Review

Fed. R. Civ. P. 15(d) allows supplemental pleadings upon leave of court and upon such terms that are just. Supplemental pleadings are appropriate to allege relevant facts that occurred after the original pleading was filed. *Keith v. Volpe*, 858, F.2d 467, 468 (9th Cir. 1988). The standards for granting a motion to supplement under Rule 15(d) are the same as the standards for leave to amend under Rule 15(a). *Glatt v. Chicago Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996). 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. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

Supplemental pleadings are favored, however, because they enable the court to award complete relief in the same action, and avoid the cost and delay of a separate lawsuit. Therefore, absent a clear showing of prejudice to the opposing party, supplemental pleadings are liberally allowed. *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988).

2. Discussion

Good cause exists to grant Defendants' motion. Defendants did not include other versions of the QSI manual in their original pleading because Defendants were unaware at the time that Plaintiff's software, Decoder Pro, infringes on portions of versions 4.02, 4.1, 4.3 and 4.4 of the QSI Manual. KAM has registered all versions of the QSI Manual with the United States Copyright Office, however registrations for versions 4.1, 4.3 and 4.4 are still pending.

Defendants do not seek to supplement their counterclaim for purposes of delay and allowing this supplemental pleading should not affect the schedule in this case.

Allowing the supplemental pleading would also not be futile. The supplemental counterclaim adds facts to a valid counterclaim. This claim is not subject to dismissal nor has any statute of limitation or ultimate repose run on Defendants' counterclaim.

Plaintiff should not suffer any prejudice as a result of this supplemental counterclaim. Plaintiff already has received notice of Defendants' supplemental facts through the discovery process, which is still on-going. Depositions have yet to be taken in this case. The deadline for hearing dispositive motions is not until December 4, 2009. The supplemental pleading should not cause any delay or significant additional expense to Plaintiff.

CONCLUSION

Based on the above Defendants respectfully request that this Court grant leave for Defendants to file the attached first supplemental counterclaim.

Dated August 20, 2009.

Respectfully submitted,

/s/Scott Jerger

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1 2 **CERTIFICATE OF SERVICE** 3 I certify that on August 20, 2009, I served Matthew Katzer's and KAM's MOTION FOR LEAVE TO FILE FIRST SUPPLEMENTAL COUNTERCLAIM on the following parties 4 through their attorneys via the Court's ECF filing system: 5 6 Victoria K. Hall Attorney for Robert Jacobsen 7 Law Office of Victoria K. Hall 8 3 Bethesda Metro Suite 700 Bethesda, MD 20814 9 David McGowan 10 Warren Hall 5998 Alcala Park 11 San Diego, CA 92110 12 /s/ Scott Jerger 13 R. Scott Jerger (pro hac vice) Field Jerger LLP 14 15 16 17 18 19 20 21 22 23 24 25 26

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