

EXHIBIT G



LEXSEE 2008 U.S. DIST. LEXIS 10846



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As of: Jul 27, 2009

ATMEL CORPORATION, a Delaware corporation; ATMEL SWITZERLAND, a corporation; ATMEL FRANCE, a corporation; ATMEL SARL, a corporation, Plaintiffs, v. AUTHENTEC, INC., a Delaware corporation, Defendant.

No. C 06-2138 CW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 10846

January 31, 2008, Decided

January 31, 2008, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part, Motion denied by *Atmel Corp. v. Authentec, Inc.*, 2008 U.S. Dist. LEXIS 10850 (N.D. Cal., Jan. 31, 2008)

PRIOR HISTORY: *ATMEL Corp. v. Authentec, Inc.*, 2007 U.S. Dist. LEXIS 49090 (N.D. Cal., June 29, 2007)

COUNSEL: [*1] For Atmel Corporation, a Delaware corporation, Plaintiff: Denise L. McKenzie, LEAD ATTORNEY, Attorney at Law, Sidley Austin LLP, Los Angeles, CA; Edward Gerard Poplawski, Franklin Devin Kang, Olivia M Kim, LEAD ATTORNEYS, Sidley Austin LLP, Los Angeles, CA.

For Atmel France, Atmel SARL, Atmel Switzerland, Plaintiffs: Denise L. McKenzie, Attorney at Law, Sidley Austin LLP, Los Angeles, CA; Franklin Devin Kang, Olivia M Kim, Sidley Austin LLP, Los Angeles, CA.

For Authentec Inc, Defendant, Counter-claimant: Henry C. Bunsow, LEAD ATTORNEY, Denise M. De Mory, Ethan B. Andelman, Howrey LLP, San Francisco, CA; Brian A. E. Smith, Howrey Simon Arnold & White, San

Francisco, CA; Courtney Towle, San Francisco, CA; Matthew Greinert, Attorney at Law, San Francisco, CA.

For Lexar Media Inc., 3rd party defendant: Denise M. De Mory, LEAD ATTORNEY, Howrey LLP, San Francisco, CA.

For Authentec Inc, Counter-claimant: Brian A. E. Smith, Howrey Simon Arnold & White, San Francisco, CA; Courtney Towle, San Francisco, CA; Denise M. De Mory, Ethan B. Andelman, Howrey LLP, San Francisco, CA; Matthew Greinert, Attorney at Law, San Francisco, CA.

For Atmel Corporation, a Delaware corporation, Atmel France, Atmel [*2] SARL, Atmel Switzerland, Counter-defendants: Denise M. De Mory, Howrey LLP, San Francisco, CA.

JUDGES: CLAUDIA WILKEN, United States District Judge.

OPINION BY: CLAUDIA WILKEN

OPINION

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO AMEND THE CASE MANAGEMENT ORDER AND DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

Plaintiffs have filed a motion for leave to file a second amended complaint (SAC). Because the deadline for amendment has passed, Plaintiffs have also filed a motion to amend the case management order. Defendant opposes the motions. The motions were submitted on the papers. Having considered all of the parties' papers, the Court grants the motion for leave to amend the case management order in part and denies it in part and denies the motion for leave to file a SAC.

BACKGROUND

Plaintiffs filed this action on March 22, 2006. At the initial case management conference, the Court set November 1, 2006 as the deadline to add parties or claims. Docket No. 21. The fact discovery cut off was initially set for June 19, 2007. The fact discovery deadline was extended once by stipulation to September 21, 2007 and again by Plaintiffs' motion to December 21, 2007. Plaintiffs filed [*3] the instant motions on December 6, 2007. Although Plaintiffs assert that they will need additional discovery to support their proposed claims, they do not move for relief from the December 21, 2007 discovery deadline.

LEGAL STANDARDS

I. Rule 16

Under *Federal Rule of Civil Procedure 16(b)*, "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge." *Fed. R. Civ. Pro. 16(b)*. Where a schedule has been filed, the plaintiff's ability "to amend his complaint [is] governed by *Rule 16(b)*, not *Rule 15(a)*." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). A party seeking to amend a pleading after the date specified in a scheduling order must first show "good cause" for the amendment under *Rule 16(b)*, and second, if good cause is shown, the party must demonstrate that the amendment is proper under *Rule 15*. *Id.*

In order to determine whether good cause exists,

courts primarily consider the diligence of the party seeking the modification. *Johnson*, 975 F.2d at 609; see also *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000). "[N]ot only must parties participate from the outset in creating a workable Rule 16 scheduling [*4] order but they must also diligently attempt to adhere to that schedule throughout the subsequent course of the litigation." *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 607 (E.D. Cal. 1999). A party moving for an amendment to a scheduling order must therefore show it was diligent in assisting the Court to create a workable schedule at the outset of litigation, that the scheduling order imposes deadlines that have become unworkable notwithstanding its diligent efforts to comply with the schedule, and that it was diligent in seeking the amendment once it became apparent that extensions were necessary. See *id.* at 608.

II. Rule 15

Federal Rule of Civil Procedure 15(a) provides that leave of the court allowing a party to amend its pleading "shall be freely given when justice so requires." Leave to amend lies within the sound discretion of the trial court, which discretion "must be guided by the underlying purpose of *Rule 15* to facilitate decision on the merits, rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (citations omitted). Thus, Rule 15's policy of favoring amendments to pleadings should be applied with "extreme liberality." *Id.*; [*5] *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (citations omitted).

The Supreme Court has identified four factors relevant to whether a motion for leave to amend should be denied: undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). The Ninth Circuit holds that these factors are not of equal weight; specifically, delay alone is insufficient ground for denying leave to amend. *Webb*, 655 F.2d at 980. Further, the "liberality in granting leave to amend is not dependent on whether the amendment will add causes of action or parties." *DCD Programs*, 833 F.2d at 186. Rather, the court should consider whether the proposed amendment would cause the opposing party undue prejudice, is sought in bad faith, or constitutes an exercise in futility. *Id.* (citing *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398-99 (9th Cir. 1986); *United States v. City of Twin*

Falls, 806 F.2d 862, 876 (9th Cir. 1986); *Howey v. United States*, 481 F.2d 1187, 1190-91 (9th Cir. 1973); *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1293 (9th Cir. 1983)).

Prejudice typically [*6] arises where the opposing party is surprised with new allegations which require more discovery or will otherwise delay resolution of the case. *See, e.g., Acri*, 781 F.2d at 1398-99; *Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 210 (5th Cir. 1986). The party opposing the motion bears the burden of showing prejudice. *DCD Programs*, 833 F.2d at 186; *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir. 1977).

DISCUSSION

Plaintiffs seek leave to amend their complaint in two general areas. First, Plaintiffs seek leave to include allegations about five additional sensors that were not mentioned in their first amended complaint (FAC). Plaintiffs also seek leave to allege infringement under 35 U.S.C. § 271(f) based on Defendants' distribution of software created in the United States to foreign manufacturers. Plaintiffs allege that they only recently discovered the existence of the other sensors and Defendant's distribution of essential software components from the United States to foreign manufacturers.¹

1 Plaintiffs also seek to amend their complaint to state correctly the principal place of business of Plaintiff Atmel SARL. This amendment is not necessary.

I. Additional Sensors

Plaintiffs [*7] argue that they were unaware of five additional infringing sensors, EntrePad Sensors AES 2500, 2550, 2810, 1710 and 1711, until they were disclosed during depositions of Defendant's employees and *Rule 30(b)(6)* witnesses.² Defendant counters that the proposed amendment is not necessary because Plaintiffs are not required to name every infringing product in their complaint under the notice pleading requirements of *Federal Rule of Civil Procedure 8*. Defendant notes that the FAC alleges that "AuthenTec has been and still is offering for sale, selling, marketing, using and importing biometric sensors, including the following." FAC P 12. Defendant argues that "this allegation is more than sufficient to cover all biometric sensors sold by AuthenTec" and contends that it "has

provided all necessary discovery on these products, despite their omission from the complaint and the initial infringement contentions." Opposition at 5. In other words, Defendant concedes that Plaintiffs need not amend their complaint to pursue claims based on the additional sensors.

2 Plaintiffs also seek to add allegations about two pieces of Defendant's software, AuthenTec Performance Analysis Tool (PAT) and AuthenTec [*8] Software Development Kit (SDK). However, it appears that these two pieces of software are relevant only to Plaintiffs' proposed § 271(f) claim discussed below.

However, Defendant argues that such an amendment would not be sufficient to allow Plaintiffs to pursue claims based on these products pursuant to Patent Local Rule 3-1(b), which requires Plaintiffs to include in their Disclosure of Asserted Claims and Preliminary Infringement Contentions, "each accused apparatus, product, device, process, method, act, or other instrumentality." Defendant states that, if Plaintiffs had "appropriately requested to serve infringement contentions on these products, [it] would have stipulated to permit Atmel to serve supplemental contentions" on the 2500, 1710 and 2810 sensors." Opposition at 5.

In the interest of judicial economy, the Court will consider whether Plaintiffs have met the requirements of *Patent Local Rule 3-7*, which, like *Federal Rule of Civil Procedure 16*, requires a "showing of good cause" in order to allow amendment of infringement contentions. *Patent L.R. 3-7*. Because Defendant states that it would stipulate to supplemental contentions regarding the 2500, 1710 and 2810 sensors, the [*9] Court grants Plaintiffs leave to serve such contentions.

Defendant's only argument against amendment to allow claims regarding the remaining products, the 1711 and 2550 sensors, is that they are still in development and not being sold. Therefore, Defendant argues that the products do not give rise to liability under the patent laws. Plaintiffs assert that they seek to pursue claims based on the 1711 and 2550 sensors because they learned during the November 28, 2007 deposition of Defendant's employee Art Stewart that Defendant is selling the two sensors. Plaintiffs' counsel first asked Stewart, "has AuthenTec sold any AES 1711 products?" McKenzie Decl., Ex. 8 at 148. Stewart responded, "It's very early in the product life. So, we might still be shipping

pre-production samples for that part. So, I would say sold, maybe not yet." *Id.* Although this statement does not unambiguously establish that AuthenTec has sold the 1711 sensor, 35 U.S.C. § 271(a) provides that making, using and offering to sell infringing products can give rise to liability. The creation of pre-production samples is enough, at this stage, to support a claim under § 271(a). Plaintiffs also asked Stewart if AuthenTec had [*10] begun providing the 2550 sensor to its customers. Stewart responded, "I believe we are now selling that to Fujitsu PC." *Id.* at 149. Defendant states only that Stewart "was incorrect" but provides no declaration or evidence in support of its contention that "the 2550 is still in development." Opposition at 6 n.3.

Plaintiffs have demonstrated that they recently discovered that Defendants are making and selling the 1711 and 2550 sensors. In doing so, Plaintiffs have demonstrated good cause for allowing them to amend their infringement contentions as required by *Patent Local Rule 3-7*.

Plaintiffs assert that they will need additional discovery in order to supplement their infringement contentions, but have not formally requested modification of the case management order's December 21, 2007 discovery deadline. Defendant argues that it has already produced all relevant documents related to these products. However, Plaintiffs state that they need "data sheets" for the 2810 and 1710 sensors. In the interest of judicial economy, the Court orders Defendant to produce any such documents within one week of the date of this order or to file a certification that it has already produced such documents [*11] or that they do not exist.

If Plaintiffs intend to seek other additional discovery, they shall, within two weeks of the date of this order, file a Rule 16 motion seeking an extension of the discovery deadline, describing with specificity the information they intend to seek and why they were not able to obtain that information prior to the discovery cut off. If Plaintiffs do not intend to seek additional discovery, they shall serve any supplemental infringement contentions within that time.

II. Section 271(f) Claim

Plaintiffs next seek to amend their complaint to include a § 271(f) claim. Title 35 U.S.C. § 271(f)(1), creates liability for

(1) Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

(2) Whoever without authority supplies or causes to be supplied in or from the United States any component [*12] of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

Plaintiffs argue that they recently learned that Defendant supplies essential software to foreign customers. Plaintiffs further argue that those customers use the software in combination with foreign-produced semiconductors in a manner that infringes the patents in suit.

Defendant counters that Plaintiffs cannot demonstrate good cause under *Rule 16* to permit this late amendment. Further, Defendant argues that, even if Plaintiffs are permitted to modify the case management schedule, the proposed amendment is futile and should not be allowed under *Rule 15*.

Because the Court finds that Plaintiffs' claims are foreclosed by *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 167 L. Ed. 2d 737 (2007), and are therefore [*13] futile, it does not address the sufficiency of Plaintiffs' showing under *Rule 16*. In *Microsoft*, the Supreme Court held that software "abstracted from a tangible copy" is

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simply information that does not constitute a component supplied from the United States for purposes of § 271(f). *Id.* at 1755. The Supreme Court found, "The master disk or electronic transmission Microsoft sends from the United States is never installed on any of the foreign-made computers in question." *Id.* at 1751. Rather, the foreign manufacturers made copies of the software, which were ultimately installed. *Id.* Therefore, the Supreme Court held, "Because Microsoft does not export from the United States the copies actually installed, it does not 'supply from the United States' 'components' of the relevant computers, and therefore is not liable under § 271(f) as currently written." *Id.* In other words, "the very components supplied from the United States, and not copies thereof, trigger § 271(f) liability when combined abroad to form the patented invention at issue." *Id.* at 1757.

According to Plaintiffs, Defendant supplies its software electronically to customers overseas. Therefore, Plaintiffs attempt to distinguish [*14] *Microsoft* by arguing that the "master copy of the software remains in the United States." Motion at 11. However, *Microsoft* also addressed "the electronic transmission" of the software at issue there and held that such transmissions

are not themselves installed on the computers. Rather, the transmissions are copied onto the receiving computer and then copied for installation on the products in question.

Therefore, the Court finds that Plaintiffs' proposed § 271(f) claim is futile.

CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' motions to modify the case management order and DENIES Plaintiffs' motion for leave to file a SAC. Unless Plaintiffs intend to seek leave to conduct additional discovery, they shall file amended infringement contentions within two weeks of the date of this order.

IT IS SO ORDERED.

Dated: 1/31/08

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge

EXHIBIT H



LEXSEE 2008 U.S. DIST. LEXIS 36472



Analysis
As of: Jul 27, 2009

CHARLES M. BROWN, Plaintiff, v. WIRELESS NETWORKS, INC., Defendant.

No. C 07-4301 (EDL)

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA**

2008 U.S. Dist. LEXIS 36472

April 24, 2008, Decided

April 24, 2008, Filed

SUBSEQUENT HISTORY: Partial summary judgment granted by *Brown v. Wireless Networks, Inc., 2008 U.S. Dist. LEXIS 95696 (N.D. Cal., Nov. 17, 2008)*

PRIOR HISTORY: *Brown v. Wireless Networks, Inc., 2007 U.S. Dist. LEXIS 80828 (N.D. Cal., Oct. 23, 2007)*

COUNSEL: [*1] For Charles M. Brown, an individual, Plaintiff: Jeffrey Filon Ryan, LEAD ATTORNEY, Ryan & Steiner, Mountain View, CA.

For Wireless Networks, Inc., a Delaware Corporation, Defendant: Jessica E. La Londe, LEAD ATTORNEY, One Market, Spear Tower, San Francisco, CA; Daniel J. Herling, Keller & Heckman LLP, San Francisco, CA; Lina M. Brenner, Duane & Morris LLP, San Francisco, CA.

For Wireless Networks, Inc., a Delaware Corporation, Counter-claimants: Jessica E. La Londe, LEAD ATTORNEY, One Market, Spear Tower, San Francisco, CA; Daniel J. Herling, Keller & Heckman LLP, San Francisco, CA; Lina M. Brenner, Duane & Morris LLP, San Francisco, CA.

For Charles M. Brown, an individual, Counter-defendant: Jeffrey Filon Ryan, LEAD ATTORNEY, Ryan & Steiner, Mountain View, CA.

JUDGES: ELIZABETH D. LAPORTE, United States Magistrate Judge.

OPINION BY: ELIZABETH D. LAPORTE

OPINION

ORDER DENYING LEAVE TO AMEND;
DENYING MOTION TO DISMISS DEFAMATION
CLAIM

Now before the court are Plaintiff's motion requesting leave to amend his complaint, and Defendant Wireless Networks, Inc.'s ("WNI") motion to dismiss Plaintiff's defamation claim. Having carefully reviewed the parties' papers and considered [*2] their arguments and the relevant legal authority, the Court hereby denies Plaintiff's request for leave to amend and WNI's motion to dismiss for the following reasons.

I. BACKGROUND

This breach of contract case was removed from state court on August 21, 2007. WNI removed this action pursuant to 28 U.S.C. § 1441 after Plaintiff Charles Brown amended his complaint to change his demand from \$ 51,617.32 for breach of contract and \$ 3,351.00 for common counts to the same amount for breach of contract and \$ 46,876.60 for common counts and wages due, for a new total of \$ 98,493.92 in damages. On September 5, 2007, Brown filed a third amended complaint without seeking permission of this court. The court noted that Brown had not requested leave to file an amended pleading pursuant to *Rule 15(a) of the Federal Rules of Civil Procedure*, and ordered that until it granted leave to amend, the second amended complaint was the operative complaint.

On September 6, 2007, Brown filed yet another amended complaint, labeled as "errata" to the third amended complaint (referred to herein as the fourth amended complaint). Brown did not seek leave from the court to file this amended complaint. Brown filed the [*3] fourth amended complaint after WNI's counsel notified his counsel that Brown had alleged no damages in his complaint. The fourth amended complaint increased the amount of controversy again to a total of \$ 98,653.92. WNI moved to strike Brown's fourth amended complaint on the grounds that it was filed in violation of *Federal Rule of Civil Procedure 15(a)*, which provides that each party has a right to amend its pleadings *once* as a matter of course any time before a responsive pleading is served. The Court granted that motion, but allowed Plaintiff to amend his complaint to restate the claims he previously pled, noting that he could not file any subsequent complaints without the Court's permission. See 10/23/07 Order. The Court also cautioned Brown that it would not be so lenient should he violate federal procedural rules in the future.

On November 16, 2007, Brown filed a Third Amended Complaint (in reality, his fifth amended complaint) that alleged, among other things, that Defendant WNI was an alter ego of Ruy Rothschild de Souza, Wireless Networks do Brazil ("WNB"), and MRG International ("MRG") beginning in 2004 going forward. That complaint also included a defamation claim based on [*4] a September 7, 2007 letter sent by de Souza to WNI shareholders, which Brown attached to the complaint. Brown now seeks leave to amend to add de Souza, WNB, and MRG as defendants in this action. WNI moves to dismiss the defamation claim.

II. PLAINTIFF'S MOTION FOR LEAVE TO AMEND

Federal Rule of Civil Procedure ("FRCP") 15(a) requires that a plaintiff obtain either consent or leave of court to amend its complaint once defendant has answered. "[L]eave shall be freely given when justice so requires." See, e.g., *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (leave to amend granted with "extreme liberality"); *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2003) (same). Leave to amend is thus ordinarily permitted unless the amendment is futile, untimely, would cause undue prejudice to defendants, or is sought by plaintiffs in bad faith or with a dilatory motive. *DCD Programs, Ltd. V. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987); *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). However, "late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the [*5] cause of action." *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994) (citation omitted).

Here, Brown was the President of WNI until about July 13, 2007, and he was at the epicenter of the business's operations during almost all of the relevant time period alleged in his complaint. In addition, the majority of events alleged in Brown's complaint took place from 2001-2005, not recently. And he did not uncover the basis of his alter ego allegations in discovery, since very little discovery has occurred in this case, as the parties acknowledged at the hearing. See Fourth Amended Complaint PP 6, 9-13. Therefore, Brown had knowledge of the basis for alleging alter ego allegations from the time he filed.

Yet Brown did not seek leave to add the alleged alter egos as defendants until March 4, 2008. However, months earlier he referenced his intent to add an additional party defendant in his opposition to Defendant's motion to strike. In his August 29, 2007 filing, he alleged that Mr. de Souza was pilfering from WNB on his own behalf and running the company as his "personal fiefdom." By the time Brown generally sought leave to file an amended complaint to add the alter ego parties, the parties [*6] had already participated in a mediation,¹ WNI had filed its answer and counterclaim and Brown filed his answer, and Brown had already filed multiple amended complaints in this action without Court

permission.

1 The mediation took place in January, after alter ego allegations were made, but before Plaintiff sought leave to add new parties. Therefore, Defendant was prejudiced by having to participate in a mediation while Plaintiff indicated he would seek leave to add new parties, but had not yet done so.

In addition, Plaintiff's alter ego allegations are extremely conclusory and bare. See Fourth Amended Complaint P 3. At the hearing, Plaintiff's counsel noted that Plaintiff had only learned of the lack of shareholder meetings in the last six months, but these allegations are not in the proposed complaint. Furthermore, it is not clear what, if any, relevance recent events since the case was filed have to Plaintiff's theory. Cf. *Platt v. Billingsley*, 234 Cal. App. 2d 577, 587, 44 Cal. Rptr. 476 (1965) (upholding alter ego finding where substantial evidence supported trial court's finding that "[a]t all relevant times, the corporation was influenced, dominated and controlled by defendants") (emphasis added).

In [*7] sum, Plaintiff's dilatory behavior, Plaintiff's earlier knowledge of the facts underlying his alter ego allegations, especially in light of the fact that Plaintiff has already filed multiple amended complaints in this case, many without permission, and the prejudice caused by the fact that the parties already participated in mediation, warrant denial of Plaintiff's motion for leave to amend his complaint.

III. DEFENDANT'S MOTION TO DISMISS

A motion to dismiss under *Rule 12(b)(6)* tests the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Review is limited to the contents of the complaint. *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 385 (9th Cir. 1995). To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the minimal notice pleading requirements of *Federal Rule of Civil Procedure 8*. *Rule 8(a)(2)* requires only that the complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*.

The statement need only give the defendant "fair notice of the claim and the grounds upon which [*8] it rests." *Erickson v. Pardus*, 127 S.Ct. 2197, 2200, 167 L.

Ed. 2d 1081 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)). All allegations of material fact are taken as true. *Erickson*, 127 S.Ct. at 2200. However, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic*, 127 S.Ct. at 1964-65 (citations and quotations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 1965. A motion to dismiss should be granted if the complaint does not proffer enough facts to state a claim for relief that is plausible on its face. See *id.* at 1966-67.

On September 7, 2007, WNI, through its Chairman Mr. de Souza, sent a letter to its shareholders regarding the litigation that Brown had instituted against WNI, among other things. See LaLonde Decl., Ex. A. When Brown filed his operative amended complaint on November 16, 2007, he added a cause of action for defamation, based on this letter. WNI now moves to dismiss that cause of action on the grounds that it is barred [*9] as a matter of law by California's litigation privilege.

"A privileged publication or broadcast is one made . . . in any . . . judicial proceeding." *Cal Civ Code § 47(b)*. It has been given broad application, and while "originally enacted with reference to defamation," it applies to any communication. *Silberg v. Anderson*, 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365 (1990). "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Id.* "[T]he connection or logical relation which a communication must bear to litigation in order for the privilege to apply, is a functional connection. That is to say, the communicative act - be it a document filed with the court, a letter between counsel or an oral statement - must function as a necessary or useful step in the litigation process and must serve its purposes. This is a very different thing from saying that the communication's content need only be related in some way to the subject matter of the litigation." *Rothman v. Jackson*, 49 Cal. App. 4th 1134, 1146, 57 Cal. Rptr. 2d 284 (1996).

As [*10] a preliminary matter, WNI relies on certain materials outside the complaint in support of its motion. The Court may consider the September 2007 letter from de Souza on a motion to dismiss, as it was attached to the complaint. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989). However, the Court may not consider facts in Daniel Herling's declaration regarding Plaintiff's counsel's suggestion to him that he would file a shareholder derivative suit, as these facts are neither alleged in the complaint nor judicially noticeable.

The allegedly defamatory letter from de Souza to WNI shareholders consists of fourteen paragraphs and describes the reasons that de Souza called a shareholders meeting and elected a new board. The letter describes the company's challenges, operations, business plan, and internal problems, and notes that the business plan presented by Brown in 2002 contained unrealistic assumptions. The letter also notes that Brown did not cooperate with de Souza's attempts to facilitate the process between the Brazilian and United States WNI engineers. The letter then states that since Brown resigned, he has attempted to raise multiple [*11] obstacles to thwarting the company's success, including delaying access to the company's records and commencing legal action against the company. The letter describes Brown's claim in his suit in one paragraph, and notes that his tactics are costing WNI time and money. The letter then notes that the company intends to vigorously defend the suit.

WNI argues that it sent the letter because seven shareholders filed declarations in support of Brown's ex parte temporary restraining order application, and they alleged that they had not received sufficient information from WNI about WNI's status. WNI also claims that the letter was designed to address a potential shareholder derivative suit. However, these factual contentions are not apparent on the face of the letter and may not be considered on this motion to dismiss.

Nor is it clear, at least at this stage in the litigation, that the letter in its entirety functioned as a "necessary or useful step in the litigation process" and served the purposes of that process. *Rothman*, 49 Cal. App 4th at 1146. The "test can be satisfied only by communications which function intrinsically, and apart from any consideration of the speaker's intent, to [*12] advance a litigant's case." *Id.* at 1148. The letter itself does not

request, for example, shareholders to act as witnesses in the case. Nor does it appear to be solely a legal communication seeking support from the stockholders for its defenses and counter-claims against Brown. Rather, the letter includes more general communications about the status of the company, the challenges confronting it, and Brown's business plans. While it addresses Brown's litigation in part, it is not clear that the entire letter served to advance WNI's litigation.

In reply, WNI relies heavily on *Neville v. Chudacoff*, 160 Cal. App. 4th 1255, 73 Cal. Rptr. 3d 383 (2008), which did not directly concern California's litigation privilege. *Neville* held that a lawyer's letter to a business's customers was a "writing made in connection with an issue under consideration or review by a . . . judicial body" under California's anti-SLAPP statute. *Id.* 160 Cal. App. 4th at 1258 (citing Code Civ. Proc. § 425.16). The Court noted that whether the letter is protected under the litigation privilege informs the analysis of whether the letter is protected under the anti-SLAPP statute. The letter in *Neville*, drafted a few months before the employer commenced litigation [*13] against a former employee, warned that the employee had breached a contract and misappropriated trade secrets, and suggested to the customers that to avoid potential involvement in any ensuing litigation they should not do business with the former employee. *Id.* The employee commenced a defamation action. The Court found that the letter was "in connection with" the issues in the lawsuit. The letter here is distinguishable from the letter in *Neville*. First, at least the first half of de Souza's letter does not directly deal with Brown's suit. It is also not clearly an attempt to mitigate potential damage in the litigation, as it does not instruct shareholders not to talk with Brown or help him with his litigation. While the portion of the letter updating the shareholders about Brown's claim for money damages may well be a privileged communication to inform shareholders of the status of the litigation, the entire letter does not necessarily warrant the same level of privilege as the letter at issue in *Neville*. See *Neville v. Chudacoff*, 160 Cal. App. 4th at 1265. Dismissal of the entire defamation claim at this early stage in the litigation on the basis of California's litigation privilege [*14] is therefore not warranted.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion for leave to amend is DENIED and Defendant's motion to

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dismiss the defamation claim is DENIED.

/s/ Elizabeth D. Laporte

IT IS SO ORDERED.

ELIZABETH D. LAPORTE

Dated: April 24, 2008

United States Magistrate Judge

EXHIBIT I



LEXSEE 2006 U.S. DIST. LEXIS 81430



Cited

As of: Jul 27, 2009

NANCY LENDALL, Plaintiff, v. CHASE MANHATTAN MORTGAGE CORPORATION, Defendant.

No. C 05-03295 WHA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2006 U.S. Dist. LEXIS 81430

October 27, 2006, Decided

October 27, 2006, Filed

COUNSEL: [*1] For Nancy Lendall, Plaintiff: Jeffrey Lawrence Davidson, Laura Lynn Davidson, Law Offices of Jeffrey L. Davidson, Los Angeles, CA.; Marshall Silberberg, Law Offices of Marshall Silberberg, Newport Beach, CA.

For Chase Manhattan Mortgage Corporation, Defendant: Lori A. Bowman, Margaret H. Gillespie, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Los Angeles, CA.

JUDGES: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

OPINION BY: William H. Alsup

OPINION

ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND DENYING MOTION FOR LEAVE TO AMEND AND RESCHEDULING DISCOVERY HEARING

INTRODUCTION

In this diversity action for breach of contract and fraud, the basic question is whether plaintiff can recover roughly \$ 350,000 she previously reimbursed to her employer, Chase Manhattan Mortgage Corporation. The latter has moved for summary judgment pursuant to *Federal Rule of Civil Procedure 56*. As part of her opposition, plaintiff Nancy Lendall has moved for leave to amend her complaint so as to add a new claim under *California Labor Code § 221*. Plaintiff's request to amend, at the end of the discovery period and so close to trial, is far too [*2] late and unjustified. Plaintiff, however, has established triable issues of fact as to the two claims in her operative complaint. Accordingly, plaintiff's motion for leave to amend is **DENIED** and defendant's motion for summary judgment is also **DENIED**.

STATEMENT

Defendant Chase Manhattan Mortgage Corporation provides home-finance products such as home loans. Chase funds its home loans through money it draws from elsewhere. Chase's home loans are brokered by loan officers, who are employees of Chase. In February 1997,

Chase hired Nancy Lendall to be such a loan officer.

At the time in question, the price of home loans at Chase consisted of two components, the interest rate and the points (Schilling Decl. P 7). A "point" was equal to one percent of the loan amount (*ibid.*). A borrower would usually pay more points in order to secure a lower interest rate (*ibid.*). If a borrower chose to enter into a loan with Chase, the borrower either elected to "float" or to "lock in" the loan rate (*id.* at P 6). If the borrower chose the float option, the borrower took the risk that the market rate (*i.e.*, the rate at which Chase itself would acquire the money) for the [*3] loan would go up prior to closing. If the borrower chose to lock in the loan rate, the borrower paid the locked in rate regardless of fluctuations in the market rate.

The borrower would make his or her initial agreement to a loan over the phone with a Chase loan officer. The loan officer offered a certain rate depending on the credit history and circumstances of the particular borrower. If the borrower chose to take out a loan with Chase, the borrower indicated his or her desire to "lock in" or "float" over the phone. The borrower then confirmed his or her preference to lock in or to float the loan rate on a form provided by Chase to the borrower within several days. Within roughly two weeks, the borrower was to complete further paperwork in order to finalize the loan. The borrower could back out at any time prior to accepting the loan proceeds, subject to the loss of certain fees if he or she backed out after processing the loan application. Critically, if the customer wanted to lock in the rate, the loan officer was required to specify this fact in the firm's computer system so that it could reserve the funds at the designated rate and thereby avoid being burned by a rise in interest [*4] rates.

Chase's loan officers negotiated loans directly with the potential borrowers. These loan officers were paid through commissions on the loans they generated (*id.* at P 8; Compl. Exh. A). If a loan officer closed a loan for more than the market rate, an "overage" or premium was created (Schilling Decl. P 8). An overage was created, for example, if Chase made a loan at seven percent even though the market rate that day was five percent. In contrast, if the officer closed a loan for less than the price of the product, an "underage" or loss on the loan was created (*ibid.*).

There were two distinct scenarios where an underage resulted (*id.* at P 9). *First*, an underage occurred where the loan officer and the borrower agreed to a price below the market price for the loan. Chase apparently sometimes encouraged its loan officers to create underages in this first manner in order to keep a valuable client with the company or to assure that certain referral services continued to promote Chase's products. *Second*, an underage could occur if the loan officer neglected to reserve or lock in the funds and the interest rate increased by the time of closing. In this scenario, [*5] the customer got the rate promised and Chase absorbed the underage. This scenario was not supposed to happen.

In this particular case, plaintiff Lendall's employment as a loan officer with Chase was governed by two agreements. *First*, there was an employment agreement specific to Lendall entitled "Terms of Agreement--Retail Loan Officer" (Compl. Exh. A). The agreement, signed by Lendall, provided the following provision regarding overages and underages (*ibid.*)

Overages and Underages will be calculated as follows:

| | |
|-------------|---|
| Overages-- | Based on tier |
| | Maximum of 2 pts. |
| Underages-- | Based on tier |
| | Split up to a maximum of 1 pt.; any losses |
| | exceeding 1 pt. will be the responsibility of |
| | the participant. |

Payment shall be made based on the net results of all Overages and Underages after each one has been separately calculated in the above rates.

In other words, Lendall was to receive a commission equal to the total of her overages minus any underages as calculated above.

Second, Lendall's employment was also governed by the "CMMC Retail Channel Loan Officer--Compensation Plan and Policy Statement California Division" (Compl. Exh. B). The compensation [*6] plan stated that it "is to be read along with any applicable Terms of Agreement ("Terms") and both are subject to change, only in writing, at anytime and for any reason, at the discretion of the Channel Executive" (*ibid.*). The compensation plan provided for no base salary (*ibid.*). The plan also contained a provision regarding overages and underages (*ibid.*) (emphasis in original):

Overage/Underage: As set forth in Terms of Agreement, will be paid on a monthly basis on the last payroll of the following month. Difference between actual revenues collected and revenue requirements will be treated as follows:

Overage amounts will be split with loan officers as per the divisional overage policy, up to maximum allowable overage limits.

Underage amounts will be split with loan officers as per the divisional underage policy, up to normal divisional underage rules.

The compensation plan required officers to "[b]e certain that in all cases, when loans are rate locked, the lock expiration date is the sales date or exceeds the closing date specified in the sales contract. Any exceptions must be authorized in writing by the next level manager" (*ibid.*

[*7]). Similarly, the plan provided that loan officers "cannot originate an underage in excess of divisional policy without approval from the next level manager" (*ibid.*).

* * *

From January 2002 to June 2003, mortgage rates were generally declining (Lendall Dep. 89; Schilling Decl. P 10), a circumstance that might induce a loan officer to "play the market," as we shall see below. In July 2003, however, there was a sharp increase in the interest rates (*ibid.*). In a market of increasing rates, Chase was forced to fight harder to get loans because the high rates reduced the number of consumers able to afford the loans. At around this time, therefore the competition for home loans became very competitive due to rising rates. In her complaint, plaintiff alleged that her division manager, Rick Cossano, "*acting on behalf of CMMC, made an oral offer to permit Ms. Lendall to negotiate rates with underages without being charged for those underages in order to secure or maintain CMMC's market share*" (Compl. P 16) (emphasis added). During oral argument, plaintiff's counsel clarified that this promise was apparently made to plaintiff several times in mid-2003.

Plaintiff's manager, Cossano, [*8] learned in late 2003 that Lendall had accrued significant underages. At that time, Cossano discovered that plaintiff had over thirty loans in the system from July 2003 alone where the borrower's desired rate, contrary to the ground rules, had not been locked in (Cossano Dep. 35). Cossano was alerted to this situation on a tip from Lendall's assistant, Christina Fang (*ibid.*; Lendall Dep. 90). By late 2003, Lendall's loans had over fifty loans with underages amounting to more than \$ 350,000 (Schilling Decl. Exh. D). Cossano thus became concerned that Lendall was "playing the market" (Cossano Dep. 37).

Playing the market involved loan officers accruing the second type of underages, *i.e.*, underages in which the officer delayed in locking in a lock-in loan at the borrower's requested rate. Loan officers might have done so, contrary to the ground rules, with the expectation that the market rate would drop prior to closing. If the market rate dropped, the loan officer would close the loan with an overage, thereby boosting the loan officer's commission. Of course, a significant risk was involved with this gaming of the market. If the market rate turned upward after the borrower had [*9] asked for a locked

rate, Chase had to make up the difference; in turn, the agreements in place shifted part of the burden of this shortfall (*i.e.*, underage) to the loan officer. As stated, underages were not supposed to be created in this manner. The only acceptable way to create an underage was to do so knowingly up front, as in quoting a discount up front for business development reasons.

At Cossano's request, Lendall's branch and regional managers, Todd Brebner and Ed Vaccaro, investigated the loans brokered by plaintiff during the second half of 2003. Based on the investigation, Lendall's managers confirmed Cossano's suspicions that Lendall was playing the market (Cossano Dep. 37). According to Vaccaro, at a meeting with him, Brebner and Cossano, "Ms. Lendall admitted that 'she had made a mistake' in failing to lock the loans at the rates that borrowers expected" (Vaccaro Decl. P 4).

During oral argument, Lendall's counsel proffered the theory that Lendall's assistants, including Christina Fang, were to blame for the delay in locking in the loans in a timely fashion, or at least for failing to secure extensions of time in which to lock in the loans. This argument, however, [*10] was contradicted, at least in part, by the loan-inventory cards submitted by Chase (Schilling Decl. Exh. E). The loan-inventory cards tracked the loans on which Lendall accrued her underages during the contested time period. According to these inventory cards, *Lendall herself* failed to lock in the loans in a timely fashion in 42 out of the 50 loans on which underages were accrued. On the other hand, that leaves eight candidates to possibly support Lendall's theory.

Furthermore, plaintiff's counsel argued during the hearing that the policy expressed in her written employment agreements that required deduction of underages out of her commission was not followed by Chase with respect to other loan officers. The only other officer, however, that Lendall pointed to as receiving different treatment than Lendall was Jason Aiello. Lendall did not depose Aiello apparently because she could not track him down. In any event, Aiello's commission statements produced by Chase seem to indicate that he too received deductions from his commission for underages (Gillespie Reply Decl. Exhs. at CMMC 1277).

Plaintiff resigned, or at least attempted to resign, in October 2003 (Compl. P 22). Shortly [*11] thereafter, Cossano "represented to Ms. Lendall that her actions in

closing loans that did not get into the system on time, where the rates were not locked in and where the lock-in was not extended were fraudulent, a breach of contract and criminal" (*id.* P 21). Similarly, Lendall's regional manager Ed Vaccaro allegedly "represented to Ms. Lendall that CMMC would bring criminal charges against her which would result in her losing her home if she did not rescind her resignation and return to her employment with CMMC" (*ibid.*). Cossano testified during his deposition that he indeed discussed with Lendall the possible criminal and civil ramifications of her failure to repay Chase (Cossano Dep. 44). After these discussions, Lendall sought legal counsel to analyze her potential risk for civil and criminal liability arising from the underages (Lendall Dep. 135). Lendall, scared of losing her house and assets and even suffering criminal penalties, chose to return to work at Chase.

In the months following July 2003, Chase and Lendall negotiated a manner for dealing with the losses (Lendall Dep. 155, 193; Cossano Dep. 23). In December 2003, Lendall and Chase reached a purported agreement [*12] regarding Lendall's losses. The December 2003 agreement primarily involved crediting Lendall with a higher commission rate than her ordinary commission rate for her 2003 loans so as to help her offset the losses (*id.* at Exh. A; Lendall Dep. 155; Cossano Dep. 23). An email from Cossano explained the benefits of the agreement to the other managers (Vaccaro Decl. Exh. A):

Nancy [Lendall] has agreed to pay us the subtotal before the end of 2003. I recommend accepting her proposal, because we will immediately collect \$ 19,675 from Nancy. If we do not accept, I predict that she will resign and will be forced to sue her for the balance.

Plaintiff testified that she only expressed "general agreement" with the proposal (Lendall Dep. 155). In any event, it seems that plaintiff was paid consistently with the December 2003 agreement, continuing to work as a loan officer to pay off the underages (Brebner Decl. Exh. B). Lendall apparently accrued no new underages (at least in the manner of delaying to lock in requested rates) following her return to Chase in late 2003. In June 2005, plaintiff ultimately left her post as a loan officer, transferring to one of Chase's joint ventures.

[*13] * * *

On June 13, 2005, plaintiff filed her complaint in California Superior Court for the County of Contra Costa. Chase removed this action to federal court on August 12, 2005, on grounds of diversity jurisdiction. In her complaint, plaintiff listed two claims: (1) breach of oral contract and (2) fraud. Plaintiff based her breach of contract claim on Chase's purported failure to abide by the alleged oral promise (or promises) that Lendall could "negotiate rates with underages without being charged for those underages in order to secure or maintain CMMC's market share" (Compl. P 16). As to her fraud claim, plaintiff alleged that the representations by Cossano and Vaccaro that Lendall's actions would subject her to civil and criminal penalties were false misrepresentations. *

* This Court issued an order on January 19, 2006, denying plaintiff's motion for a trial by jury. The January 2006 held that plaintiff's undue delay in demanding a jury effected a waiver of that right.

Chase moved for summary judgment [*14] on September 21, 2006. Along with filing opposition papers, plaintiff filed a motion for leave to amend her complaint. By that motion to amend, plaintiff seeks to add a claim under *California Labor Code* § 221.

ANALYSIS

This order addresses both Chase's motion for summary judgment and plaintiff's motion for leave to amend.

1. MOTION FOR SUMMARY JUDGMENT.

Summary judgment is proper where the pleadings, discovery and affidavits show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *FRCP 56(c)*. The moving party has the initial burden of production to demonstrate the absence of any genuine issue of material fact. *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020, 1023-24 (9th Cir. 2004). Once the moving party meets its initial burden, the nonmoving party must "designate specific facts showing there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Thus *Celotex* creates a burden-shifting analysis for purposes of motions for summary judgment. [*15] "If the moving party shows the absence of a genuine issue of material fact, the

non-moving party must go beyond the pleadings and 'set forth specific facts' that show a genuine issue for trial." *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002) (citation omitted).

A. Fraud.

As noted above, plaintiff claimed that Chase is liable for fraud as a result of her managers' threats to take civil and criminal action against her if she quit Chase without repaying the underages she owed to them. Accordingly, Lendall returned to work for Chase in late 2003, continuing to work with Chase for over a year, working to pay back the underages she had accrued in mid-2003.

In the Court's experience, threats of criminal prosecution in the civil context are so unusual and severe that, in the absence of a decision directly on point, this order must allow plaintiff to develop her fraud claim on a full record at trial. Neither party has provided a decision directly on point. Therefore, on this record, this order cannot find that defendant's threats of criminal prosecution are immune from liability for fraud as a matter of law.

B. Breach of Oral Contract.

Chase [*16] has a stronger argument on plaintiff's claim for breach of oral contract. On the current record, the facts seem strong in favor of Chase. Nevertheless, since the same facts are likely to be evidence in background for plaintiff's fraud claim, this order denies summary judgment as to the contract claim as well. In addition, the Ninth Circuit might not agree with Chase on the instant record that summary judgment is warranted. While it is true that Lendall did not respond to defendant's motion for summary judgment with respect to her contract claim in her opposition papers, this failure was due to Lendall's belief that her motion to amend would be granted. For the reasons stated below, her motion to amend is denied. Plaintiff's counsel made clear during the oral argument that she could go forward with her contract claims as pled if the Court denied her motion to amend.

* * *

Counsel are reminded that the trial record will be a new record. The ultimate findings of fact and conclusions of law will be made on the trial record, not on the instant summary judgment record. Any indication in this order as

to which party has a stronger case has no necessary predictive value on the outcome [*17] at trial.

2. MOTION TO AMEND.

Plaintiff's also moves for leave to amend so as to add a new claim for violation of *California Labor Code § 221*. Leave to amend a complaint shall be freely given when justice so requires under *Federal Rule of Civil Procedure 15(a)*. This standard is a liberal one. *Rule 15(a)*, however, does not apply when a district court has established a deadline for amended pleadings under *Rule 16(b)*. See *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604,607-08 (9th Cir. 1992). Once a scheduling order has been entered, the liberal policy favoring amendments no longer applies. Subsequent amendments are not allowed without a request to first modify the scheduling order. *Id. at 608-09*. Any modification of the scheduling order must be based on a showing of good cause:

Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment.... Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking [*18] modification. If that party was not diligent, the inquiry should end.

Id. at 609 (citation omitted). Seeking leave to amend while a motion for summary judgment is pending "is precisely the kind of case management that *Rule 16* is designed to eliminate." *Id. at 610*.

Under the case management order in effect in this case, "[l]eave to add any new parties or pleading amendments must be sought by February 16, 2006" (Case Management Order at 1). The non-expert discovery cut-off, July 28, 2006, also already passed (*ibid.*). The last day for dispositive motions was September 14, 2006 (*id. at 3*).

Plaintiff's delay of seven months beyond the deadline

for amendments evidences a total lack of diligence. *California Labor Code § 221* provides that "[i]t shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee." It should have been clear to plaintiff at the outset of this action, prior even to *any* discovery, whether or not this code provision was implicated. Plaintiff cannot articulate any "new" facts that suddenly alerted her to this possible claim over a year [*19] after she filed her complaint in state court.

Moreover, while prejudice to Chase is not dispositive, the prejudice to Chase is persuasive here. Defendant fully proceeded with discovery in this action on the assumption that only two claims, breach and fraud, were in issue. The discovery deadline has passed. Suddenly, *after* Chase filed its motion for summary judgment, plaintiff sought to inject an entirely new legal theory into the action. Had Chase known of this claim earlier in the litigation, Chase could have sought experts regarding *Section 221*, taken relevant depositions, and propounded affirmative discovery requests relating to this claim. Adding this claim at the last minute would strip Chase of the opportunity to fully defend this claim. This order will not countenance such dilatory tactics.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is **DENIED** and plaintiff's motion for leave to amend is also **DENIED**. The hearing scheduled for plaintiff's motion to amend is hereby **VACATED**. The discovery hearing, currently scheduled for November 2, 2006, must be moved due to a conflict with the Court's schedule. The hearing will [*20] now be held on **NOVEMBER 6, 2006 AT 1:15 P.M.**

IT IS SO ORDERED.

Dated: October 27, 2006

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE