IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-B-1854(BNB)

LAWRENCE GOLAN
RICHARD KAPP
S.A. PUBLISHING CO., INC., d/b/a ESS.A.Y RECORDINGS
SYMPHONY OF THE CANYONS
RON HALL d/b/a FESTIVAL FILMS
JOHN MCDONOUGH, d/b/a TIMELESS VIDEO ALTERNATIVES INTERNATIONAL

Plaintiffs,

vs.

JOHN ASHCROFT, in his official capacity as Attorney General of the United States,

Defendant.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE PURSUANT TO FRCP 15(A) TO AMEND COMPLAINT

Plaintiffs Lawrence Golan, Richard Kapp, S.A. Publishing Co., Inc. d/b/a ESS.A.Y Recordings, Symphony Of The Canyons, Ron Hall d/b/a Festival Films, and John McDonough d/b/a Timeless Video Alternatives International (collectively "Plaintiffs") submit this reply brief in support of Plaintiffs' Motion For Leave Pursuant to FRCP 15(a) To Amend Complaint.

ARGUMENT

Defendant admits that *no prejudice* would result from the amendments sought in the instant motion. Defendant's argument rests solely on a claim that Plaintiffs have delayed in obtaining the amendment and that the relief Plaintiffs seek is somehow untimely. Defendant's argument should be rejected.

A. Leave To Amend Should Be Granted As There Has Been No Delay.

Defendant argues that because the case has been pending for nearly three years, Plaintiffs may not now amend the complaint. This simplistic argument is belied by the procedural history of this case. A brief summary of that history is necessary to show how – despite the passage of nearly three years -- this case is in its early stages and no delay is attributable to Plaintiffs.

Plaintiffs' filed the original complaint on September 19, 2001. *See* Complaint [Docket #1]. Defendant's moved to dismiss that complaint on December 14, 2001. *See* Def.'s Mot. To Dismiss [Docket # 5]. After the motion was fully briefed, Defendant sought to stay the case pending the outcome of the *Eldred v. Ashcroft*, to which certiorari had been granted by the Supreme Court on February 19, 2002.[1] *See* Order of Aug. 26, 2002 [Docket # 13] at 2-3. Over Plaintiffs objection, this Court agreed to administratively stay the case. *Id.* The stay lasted five months.[2] After the *Eldred* decision was announced, Plaintiffs immediately sought leave to amend the complaint specifically to address the rulings of the Supreme Court in *Eldred*. *See* Pls.' Mot. For Leave To File First Am. Compl. [Docket #15], *filed* Feb. 18, 2003. The amendment was granted, the new complaint was filed, and Defendant thereafter renewed its motion to dismiss. *See* Order of Apr. 16, 2003 [Docket # 18], First Am. Compl., *filed* Apr. 16, 2004 [Docket #19]; Def.'s Renewed Mot. To Dismiss, *filed* Apr. 30, 2003 [Docket #20]. The Court ruled on Defendant's motion to dismiss in March of this year. *See* Order of March 15, 2004 [Docket #26]. Defendant answered on April 1, 2004. *See* Answer [Docket #28]. The case was then

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[1] In late February, 2002, both Plaintiffs and Defendants filed separate Notices of Grant of Certiorari. *See* Pls.' Notice of Grant of Cert., dated Feb. 26, 2002 [Docket #11], Def.'s Notice of Grant of Cert., dated Feb. 28, 2002 [Docket # 12].

[2] The *Eldred* opinion issued on January 15, 2003. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

referred to Magistrate Judge Boland for discovery, and a Scheduling Order was entered just three months ago. *See* Scheduling Order, *entered* May 19, 2004 [Docket #32]. The deadline for amending pleadings was set for July 20, 2004. *Id.* at 14. Discovery is presently underway, and despite Defendant's attempts to delay discovery, Judge Boland ordered the case to proceed forward. *See* Order of Aug. 18, 2004 (denying Defendant's motion for protective order).

In short, from a procedural perspective, this case is in the early stages of discovery. There has been no "undu[e] and inexplicabl[e]" delay. *State Distrib. Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405 (10th Cir. 1984). Defendant's blind attribution of the period between the filing of the original complaint (September 2001) and the instant motion (July 2004) to a lack of diligence or excessive delay by Plaintiffs is wholly unfounded.[3] As the indisputable facts make clear, during the thirty-one months this litigation has been pending, it has been relatively "inactive" for approximately twenty-eight[4] of those months either over Plaintiffs' objections or for reasons outside Plaintiffs' control. Accordingly, the fact that the case has been pending for some time is of no consequence in determining whether Plaintiffs are permitted, at

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[3] Indeed, unlike Plaintiffs, Defendant has repeatedly sought to delay this case. For example, in 2002 Defendant successfully sought an administrative stay the case over Plaintiffs' objection. In April 2004, Defendant refused to serve initial disclosures and in May it argued at length that the entire case should be stayed pending resolution of his anticipated summary judgment motion. *See, e.g.,* Scheduling Order [Docket #32] at 6, 11-14. Magistrate Judge Boland rejected these attempts to delay the case. *Id.* at 6, 14. Less than 10 weeks later, Defendant again moved to stay discovery in this case, and that effort was again rejected by Judge Boland. *See* Order of August 18, 2004. Accordingly, Defendant's argument that Plaintiffs should be penalized unfairly misrepresents the procedural history of this case and ignores Defendant's repeated efforts to delaying this case from proceeding forward.

[4] This case was inactive for approximately three months while Defendant prepared its initial motion to dismiss, five months under the administrative stay that Defendants requested, and twenty months pending Defendant's motions to dismiss (nine months during initial motion to dismiss and eleven months during renewed motion).

this early stage, to amend their complaint. *Arkansas-Platte & Gulf P'ship v. Dow Chem. Co.*, 886 F. Supp. 762, 769 (D. Colo. 1995) (describing lengthy procedural history including stays pending resolution of appeal to Supreme Court and finding delay was not exclusively the fault of plaintiff); *see also Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69 (S.D.N.Y. 1982) (where plaintiffs sought leave to amend "long after original complaint was filed," leave granted because "delay [was] attributable to the stay pending arbitration sought by [defendants]").[5]

B. Leave Should Be Freely Granted Because The Amendments Sought Neither Prejudice Defendant Nor Impact The Court's Schedule.

As noted in Plaintiffs' moving papers, the amendments sought are ministerial in nature. The amendments would change none of Plaintiffs' legal theories, add no new claims, and assert no new material facts. No prejudice results from the requested amendments. The amendments also do not require a change in the ongoing discovery schedule and would have no impact on the trial date set for June 2005.

Moreover, all of the cases Defendant relies on are factually distinguishable and the reasoning applied by the Tenth Circuit in those cases is consistent with the relief sought by

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[5] Defendant also argues that Plaintiffs should have sought to add the Register of Copyrights ("Register") as a defendant at an earlier point in the case. While, as discussed above, the amendment sought at this time is timely, the reason Plaintiffs did not see the need to add the Register until now is that during the recent Scheduling Conference (May 19, 2004), Defendant unexpectedly took the position that the discovery and relief Plaintiffs seek may ***not*** be attainable from Defendant Ascroft alone. Defendant's position has no legal merit. However, by adding the Register as a defendant at this time, the Court will avoid precisely these sorts of technical pleading arguments which the Federal Rules were adopted to address. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002) (Federal Rules provide "a simplified pleading system, which was adopted to focus litigation on the merits of a claim"); *Conley v. Gibson*, 355 U.S. 41, 48 (1957); *accord Arkansas-Platte*, 886 F. Supp at 765. Here, by including the Register, the litigation will be focused on the merits, and, if successful, appropriate remedies will be efficiently adjudicated.

Plaintiffs here. *See* Def.'s Opp. at 3-4. For example, in *Las Vegas Ice And Cold Storage Co. v. Far West Bank*, *Martinez v. United States*, and *Panis v. Mission Hills Bank* the motion to amend was sought well after important stages of the case had been completed. *See Las Vegas Ice.*, 893 F.2d 1182, 1185 (10th Cir. 1990) (amendment sought nine months *after* a partial summary judgment was entered and only a few months before trial); *Martinez,* 311 F. Supp. 2d 1274, 1280 (D.N.M. 2004) (amendment sought *after* summary judgment already granted); *Panis,* 60 F.3d 1486, 1495 (10th Cir. 1995) (amendment filed six months *after* the deadline for such motions, *after* nearly all discovery had taken place, and after "the case was ready for determination."); *see also Wessel v. City of Albuquerque,* 299 F.3d 1186, 1189, 1197 (10th Cir. 2002) (plaintiffs permitted to "supplement their complaint to set forth additional events which were a continuation of conduct alleged in the original complaint" but not permitted to change theory of case by adding new claim, two new defendants, a jury demand and a punitive damages request). In such circumstances, materially different from the facts here, denial of leave may be appropriate. Defendant also relies heavily on *First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127 (10th Cir. 1987), but in that case, unlike here, the amendment to an answer was sought three months *after* plaintiffs had completed discovery and not within the time specified by the court's scheduling order. *Id.* at 1129. The defendants in *First City* also displayed a pattern of delay which is not present here. *Id.* (pattern included default, lack of diligence in discovery followed by several motions to extend discovery). The circumstances in all of the cases relied upon by Defendants are drastically different from the facts here, and, accordingly, a denial of Plaintiffs' motion to amend based on these authorities is unjustified.

Finally, Defendant states, without citation, that Plaintiffs' must show a "good reason" for the amendment. *See* Def.'s Opp. at 3. This is not the law. Defendant may be confusing the Rule 16(b) "good cause" standard (to alter a scheduling order) with the Rule 15(a) liberal pleading standard. The "good cause" standard of Rule 16(b) is "much different than the more lenient standard contained in Rule 15(a)." *See Colo. Visionary Acad. v. Medtronic, Inc.,* 194 F.R.D. 684, 687 (D. Colo. 2000) (Boland, J.) (*quoting Dilmar Oil Co., Inc. v. Federated Mut. Ins. Co.*, 986 F. Supp. 959 (D.S.C. 1997) *aff'd* 129 F.3d 116 (4th Cir. 1997). Accordingly, Defendant's proposed standard for denying this motion to amend should be rejected.

CONCLUSION

Accordingly, for the reasons stated above and in Plaintiffs' moving papers, the Court should grant Plaintiffs' Motion and allow the filing of their Second Amended Complaint.

Dated: August 20, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE PURSUANT TO FRCP 15(A) TO AMEND COMPLAINT** by placing a true and correct copy in the United States mail, first-class postage prepaid and via e-mail, on this 20th day of August, 2004, to:

Joshua Rabinovitz (via e-mail)
Robert D. McCallum, Jr.
John W. Suthers
Vincent M. Garvey
United States Department of Justice
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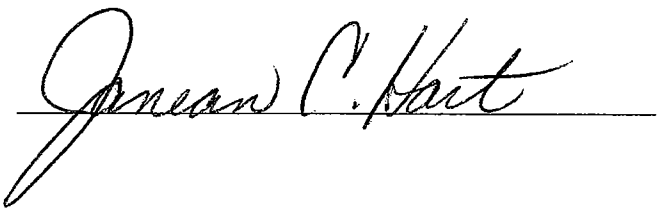

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