IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LANDS' END, INC.,

ORDER

Plaintiff,

05-C-368-C

v.

ERIC REMY, THINKSPIN,
INC., BRADERAX, INC.,
and MICHAEL SEALE,

Defendants.

- -

Trial is scheduled for November 6, 2006, in this civil action for declaratory, injunctive and monetary relief, in which plaintiff Lands' End, Inc. contends that defendants Eric Remy, Thinkspin, Inc., Braderax, Inc. and Michael Seale have violated the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)(1)(A) and state common law by collecting commissions from plaintiff through a practice known as "typosquatting." Jurisdiction is present under 28 U.S.C. §§ 1331 and 1367.

In July 2005, former defendants Tihan Seale, Kip Seale and Richard Seale moved to dismiss the plaintiff's complaint against them for lack of personal jurisdiction. In an order dated November 4, 2005, I granted their motion after finding that plaintiff had failed to

prove that any of these former defendants were subject to personal jurisdiction in Wisconsin courts. Now, nearly one year later, plaintiff has moved to amend its complaint to add former defendants Tihan Seale, Kip Seale and Richard Seale to this lawsuit once again, alleging that "newly discovered facts" make the amendment appropriate. Because I find the proposed amendment to be untimely and prejudicial, plaintiff's motion will be denied.

When I dismissed Tihan Seale, Kip Seale and Richard Seale from this lawsuit in November 2005, I noted:

> The question is whether plaintiff has shown that the Seale defendants were engaging in any . . . solicitation or provision of services as individuals. Plaintiff has made no such showing. It has not adduced any evidence to show that any or all of the individual defendants solicited the affiliate contracts from plaintiff or that they were providing services to plaintiff themselves, rather than through the corporations with which they are affiliated.

Dkt. #49, at 10-11. Now, plaintiff contends that depositions conducted in June 2006 reveal that the former Seale defendants controlled defendants Thinkspin and Braderax, and took active steps to enter into an affiliate agreement with plaintiff. These deposition statements call into question earlier affidavit testimony in which the former defendants suggested that they played minor and peripheral roles in defendants' alleged typosquatting scheme. Because the deposition testimony indicates that this court may have personal jurisdiction over the former Seale defendants after all, plaintiff has moved the court for leave to add them to the complaint once again.

Rule 15(a) of the Federal Rules of Civil Procedures requires courts to permit parties to amend their pleadings "when justice so requires." However, leave may be denied "where there has been undue delay, dilatory motive on the part of the movant, repeated failure to cure previous deficiencies, and where amendment would be futile." CogniTest Corp. v. Riverside Pub. Co., 107 F.3d 493, 499 (7th Cir. 1997) (citing McGee v. Kerr-Hickman Chrysler Plymouth, Inc., 93 F.3d 380, 385 (7th Cir. 1996)). Although "[d]elay, standing alone, may prove an insufficient ground to warrant denial of leave to amend the complaint," the "degree of prejudice to the opposing party is a significant factor in determining whether the lateness of the request ought to bar filing." Dubicz v. Commonwealth Edison Co., 377 F.3d 787, 792 (7th Cir. 2004). Courts have held repeatedly that amendments occurring after the close of discovery are prejudicial to opposing parties. See, e.g., id. at 793, n.1 ("This is not the case where a plaintiff seeks to amend its complaint after the close of discovery or on the eve of trial."); Sports Center, Inc. v. Brunswick Marine, 63 F.3d 649, 652 (7th Cir. 1995); Continental Bank, N.A. v. Meyer, 10 F.3d 1293, 1298 (7th Cir. 1993);

At the preliminary pretrial conference held in this case on February 16, 2006, the court established a March 31, 2006 deadline for filing amended pleadings. The parties were warned that attempts to amend after the deadline would be granted only by leave of court, upon a showing of good cause and lack of prejudice, and that "[t]he longer a party wait[ed] to seek leave to amend, the less likely the court w[ould be to] allow amendment." Dkt. #60,

at 2.

It was not until June 28, 2006 that plaintiff deposed former defendants Tihan Seale and acquired "the crucial evidence on which [it] relies in bringing its motion to amend." Dkt. #99, at 5. Although time was of the essence, plaintiff did not move for leave to amend its complaint because it was "occupied in defending the Seale Defendants' motion for summary judgment throughout July." Id. Even if this were a legitimate excuse for plaintiff's delay, plaintiff has offered no explanation why it waited another month before filing its motion to amend on August 29, 2006.

Now, trial is six weeks away. The deadline for filing dispositive motions passed almost three months ago and discovery closes October 6, 2006. Were I to permit the Seale defendants to be added back into this lawsuit, the trial would need to be postponed and new deadlines set for dispositive motions. Such a delay would be unreasonable, particularly in light of the fact that the question of this court's personal jurisdiction over the Seales has been an issue in this case for more than a year.

It is true that the former Seale defendants made statements earlier in this lawsuit that now appear to have been less than forthcoming. However, plaintiff has failed to show good cause for its delay in deposing the former defendants and bringing its motion to amend. Given the speed with which the trial date is approaching, I find that amending the complaint would unfairly prejudice the proposed defendants. Consequently, plaintiff's motion to

amend will be denied.

ORDER

IT IS ORDERED that plaintiff Lands' End, Inc.'s motion to amend its complaint is DENIED.

Entered this 20th day of September, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge