

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:21-CV-251-BO

BERINGER COMMERCE, INC. d/b/a
BLUE ACORN iCi,

Plaintiff,

v.

FIN CAP, INC. d/b/a “BLUEACORN.CO,”
BLUE ACORN PPP, LLC, and BLUE OAK
FOREST, LLC,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFF’S MOTION TO AMEND
SCHEDULING ORDER**

Plaintiff BERINGER COMMERCE, INC. d/b/a BLUE ACORN iCi, (“Blue Acorn iCi”) by and through undersigned counsel, and pursuant to Rules 16(b)(4) and 26(f) of the Federal Rules of Civil Procedure and Local Civil Rule 26.1(e)(2), hereby submits this Memorandum of Law in Support of its unopposed Motion to Amend the Scheduling Order [DE-57].

NATURE OF CASE AND RELEVANT FACTUAL BACKGROUND

This trademark and copyright infringement lawsuit was originally filed on June 10, 2021. After this Court heard a series of motions related to preliminary injunctive relief, and entered an order denying the requested preliminary injunction, the parties engaged in good faith settlement discussions, seeking to resolve this matter prior to engaging in formal discovery and discussing the possibility of early mediation. Specifically, throughout the late summer and fall of 2021, the parties attempted to resolve this case through negotiation of a co-existence agreement, which would allow Defendants to operate the “Blue Acorn” brand and logo until the termination of the PPP loan forgiveness program under specified terms and conditions. The parties engaged in

negotiations in the late summer and fall of 2021 until they broke down in late November 2021. Specifically, in early December 2021, Counsel for Defendants indicated that Defendants were not interested in continuing with negotiations until it received responses to discovery.

Each of the parties has served a set of written discovery to the other party, with responses current pending. The parties need additional time following the exchange of written discovery and documents to take depositions, complete all fact and expert discovery, and re-engage in potential settlement discussions.

Additionally, several significant staffing changes have occurred and require a change in counsel for Plaintiff.

First, effective January 1, 2021, Forrest Firm, P.C. merged with Michael Best & Friedrich, LLP ("Michael Best"), resulting in several significant key staffing changes. Co-lead counsel, Beth A. Stanfield, as well as Laura K. Greene have joined Michael Best's Labor and Employment Practice Group and will no longer be operating a commercial litigation practice.

Second, Co-lead Counsel, Thomas Babel, accepted a position with an outside firm Davis, Hartman & Wright, PLLC and separated from Forrest Firm, PC a few weeks before the above-referenced merger occurred. Plaintiff elected to retain representation with Michael Best, resulting in Mr. Babel's need to withdraw from this matter.

Since these events occurred, Ms. Stanfield has engaged in significant communications with Michael Best's commercial litigation team to ensure that the staffing transition is as seamless as possible. However, due to the breakdown in early resolution efforts and the complete change in counsel, the undersigned filed the instant Motion to Amend the Scheduling Order to allow the parties additional time in order to meaningfully participate in the discovery process. Counsel for Defendants has been consulted and agrees to the requested extension of time.

ARGUMENT

Federal Rule of Civil Procedure 16(b)(4) provides that “[a] court[’s] schedul[ing order] may only be modified for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4); *see also Velasquez v. Salsas & Beer Rest., Inc.*, No. 5:15-CV-146-D, 2016 WL 3339488, at *2 (E.D.N.C. June 13, 2016) (“In order to amend a scheduling order, a party must first establish ‘good cause’ under Rule 16.”) (citation omitted).

“Rule 16’s ‘good cause’ focuses primarily on ‘the diligence of the moving party.’” *Id.* (citing *Montgomery v. Anne Arundel Cty.*, 182 Fed. App’x. 156, 162 (4th Cir. 2006) (*per curiam*) (unpublished)). “Establishing good cause requires the moving party to show that the deadlines could not reasonably have been met despite the party’s diligence.” *Velasquez*, 2016 WL 3339488 at *2 (citing *Cook v. Howard*, 484 F. App’x 805, 815 (4th Cir. 2012); *United States v. Godwin*, 247 F.R.D. 503, 506 (E.D.N.C. 2007)). “In considering diligence, the court looks to whether the ‘evidence supporting the proposed amendment would not have been discovered . . . until after the amendment deadline had passed.’” *Gilbert v. Deutsche Bank Tr. Co. Americas for Residential Accredit Loans, Inc.*, No. 4:09-CV-181-D, 2016 WL 7378985, at *1 (E.D.N.C. May 25, 2016) (citing *United States v. Godwin*, 247 F.R.D. 503, 506 (E.D.N.C. 2007)) (quotation omitted).

In this action, good cause to modify the Court’s Scheduling Order exists because the events giving rise to the modification request – the breakdown in early resolution efforts and a change in lead counsel for Plaintiff – transpired recently. The undersigned acted diligently to bring the request for additional time to the Court’s attention prior to the passing of any deadlines for which extension is sought. Additionally, Counsel for Defendants consents to the requested extension of time. Accordingly, good cause to modify the Scheduling Order has been shown and this Court should grant Plaintiff’s Motion to Amend the Scheduling Order.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant its Motion to Amend the Scheduling Order pursuant to Rules 16(b)(4) and 26(f) of the Federal Rules of Civil Procedure.

RESPECTFULLY SUBMITTED, this the 6th day of January, 2022.

/s/ **Beth A. Stanfield**

Beth A. Stanfield (N.C. State Bar No. 36296)

Laura K. Greene (N.C. State Bar No. 47771)

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND SCHEDULING ORDER** with the Clerk for the United States District Court, Eastern District of North Carolina, using the electronic filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented to accept service by electronic means.

This the 6th day of January, 2022.

/s/ Beth A. Stanfield
Beth A Stanfield
Laura K. Greene

Attorneys for Plaintiff