

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

3 **MOTION**

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

6 **STATEMENT OF ISSUES TO BE DECIDED**

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

9 **STATEMENT OF RELEVANT FACTS**

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

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

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

6 ARGUMENT

7 1. Standard of Review

8 Fed. R. Civ. P. 15(d) allows supplemental pleadings upon leave of court and upon such
9 terms that are just. Supplemental pleadings are appropriate to allege relevant facts that occurred
10 after the original pleading was filed. *Keith v. Volpe*, 858 F.2d 467, 468 (9th Cir. 1988). The
11 standards for granting a motion to supplement under Rule 15(d) are the same as the standards for
12 leave to amend under Rule 15(a). *Glatt v. Chicago Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996).
13 The four factors commonly used to determine the propriety of a motion for leave to amend are
14 bad faith, undue delay, prejudice to the opposing party, and futility of amendment. *See DCD*
15 *Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

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

20 2. Discussion

21 Good cause exists to grant Defendants' motion. Defendants did not include other
22 versions of the QSI manual in their original pleading because Defendants were unaware at the
23 time that Plaintiff's software, Decoder Pro, infringes on portions of versions 4.02, 4.1, 4.3 and
24 4.4 of the QSI Manual. KAM has registered all versions of the QSI Manual with the United
25 States Copyright Office, however registrations for versions 4.1, 4.3 and 4.4 are still pending.

