

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
SUPERMEDIA LLC,)	Case No. 13-10546(KG)
)	
Reorganized Debtor.)	
_____)	
SUPERMEDIA LLC,)	
)	
Plaintiff,)	
)	
v.)	Adv. Pro. No. 15-50044(KG)
)	
YELLOW PAGES PHOTOS, INC.,)	
)	
Defendant.)	Re: Dkt. Nos. 127, 166, 173
_____)	

MEMORANDUM OPINION

On November 4, 2015, Yellow Pages Photos, Inc. (“YPPI”) filed a Motion to Amend its Proof of Claim (the “Motion”) (D.I. 127) to join AdMedia Systems, Inc. (“AdMedia”), as claimant. On December 11, 2015, SuperMedia LLC (“SuperMedia”) opposed YPPI’s motion (“Opp.”) (D.I. 166). YPPI replied on December 23, 2015 (“Reply”) (D.I. 173).

The Court denies the Motion because of undue delay and bad faith on the part of YPPI and Trent Moore, YPPI’s sole owner, director, and employee. The evidence demonstrates that Mr. Moore deceived SuperMedia’s predecessor, Idearc, during contract negotiations in July 2007, concealing his formation of a new YPPI and the assignment of copyrights from AdMedia to his new company. The evidence also shows that before this Court YPPI continued Mr. Moore’s deception, omitting from its filings

facts essential for adjudication of this case. Furthermore, the Court denies YPPI's motion because of undue prejudice to SuperMedia, as well as the futility of amendment. The Court also holds that YPPI's Proof of Claim cannot serve as AdMedia's informal proof of claim.

FACTS¹

Corporate History of AdMedia and YPPI

Trent Moore incorporated Yellow Pages Photos, Inc. ("Old YPPI"²) in 2000. 11/18/15 Tr. 6:14-16 (Moore)³; Opp., Ex. C (Old YPPI Articles of Incorporation). Old YPPI entered into a Service Contractor Agreement (the "License Agreement") with Verizon Directories Corp. ("Verizon") on or about November 16, 2001. *Id.*, Ex. B (License Agreement). The License Agreement contained an anti-assignment provision stating:

[Old YPPI] shall not assign its rights nor delegate its duties under this Agreement . . . to any third party, without Verizon Directories' prior written consent in each instance. Any attempted assignment without such prior consent shall be voidable at the sole and absolute discretion of Verizon Directories.

Id., § 12.

On November 3, 2006, Mr. Moore changed the name of Old YPPI to AdMedia, incorporated a new company called "Yellow Pages Photos, Inc." ("YPPI"), and assigned to YPPI all "right, title, and interest" in AdMedia's copyrights, including all of the

¹ This Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

² The Court will refer to the Yellow Pages Photos, Inc. that Mr. Moore incorporated in 2000 as "Old YPPI," and the Yellow Pages Photos, Inc. that he incorporated on November 3, 2006, which is currently before the Court, as "YPPI."

³ The Court will refer to trial and hearing transcripts by date, followed by the page and line.

Licensed Images (the "Assignment"). 11/18/15 Tr. 8:5-7, 9:9-12, 10:2-13 (Moore); Opp., Ex. C (Old YPPI Articles of Incorporation), Ex. D (YPPI Articles of Incorporation), Ex. E (Assignment of Copyrights). Both AdMedia and YPPI "were, and to this day are, commonly solely-owned and operated by Trent Moore."⁴ Motion at 3.

The July 2007 Amendment to the License Agreement

By May 31, 2007, Mr. Moore had informed Verizon's successor, Idearc Media Corp. ("Idearc"), that he had changed the name of Old YPPI to AdMedia. 9/30/15 Tr. 50:9-51:15 (Richter); YPPI's Supplemental Brief in Opposition to SuperMedia LLC's Motion for Summary Judgment, filed 10/23/15 (D.I. 114) ("YSB") at 13-14, Ex. D (Idearc's 5/31/07 Clip Art License Spreadsheet). He did not, however, tell Idearc that he had formed a new YPPI, nor did he ask for Idearc's consent to the Assignment, nor did he inform Idearc of it. 7/28/15 Deposition of Trent Moore ("Moore Dep.") 255:17-19⁵; 11/18/15 Tr. 12:7-10, 276:4-12 (Moore).

⁴ Under the principles of agency, specifically the doctrine of respondeat superior, the Court imputes Mr. Moore's actions and knowledge to Old YPPI/AdMedia and YPPI, since "Yellow Pages and AdMedia both are, and at all times have been, wholly-owned by W. Trent Moore, who is the sole director, officer, and employee of both companies." YPPI's Notice of Filing of Amended Proof of Claim, filed 10/23/15 (D.I. 113) ("YNF"), Ex. A (YPPI's proposed Amended Proof of Claim), ¶ 3. In *Rochez Bros. v. Rhoades*, the Third Circuit noted that the conduct of a corporate officer is imputed to the corporation when the conduct is "(1) in the course of his employment, and (2) for the benefit of the corporation." 527 F.2d 880, 884 (3d Cir. 1975). The court explained:

This is true even if the officer's conduct was unauthorized, effected for his own benefit but clothed with apparent authority of the corporation, or contrary to instructions. The underlying reason is that a corporation can speak and act only through its agents and so must be accountable for any acts committed by one of its agents within his actual or apparent scope of authority and while transacting corporate business.

Id.

⁵ Excerpts of Moore Dep. found at Opp., Ex. F.

In July 2007 Mr. Moore negotiated with Idearc to amend the License Agreement (the “Amendment”). Idearc emails from July 16-17, 2007, reveal that several Idearc employees, including Lori Lawless, a category manager in the sourcing department who negotiated and drafted the Amendment, knew that Old YPPI “[is] now called Ad Media Systems . . .” YSB, Ex. E (Idearc emails); 11/17/15 Tr. 39:10-13 (Lawless, stating her title). When Ms. Lawless spoke to Mr. Moore on or about July 16, 2007, he told her that he had changed the name of Old YPPI to AdMedia. 11/17/15 Tr. 42:22-43:2, 49:1-2, 71:11-16, 83:9-23 (Lawless).

On July 16, 2007, Ms. Lawless sent a draft Amendment to her colleague, Idearc attorney Sue Harris, stating: “I’m not sure how to word it. Please see attached.” 11/17/15 Tr. 41:19-20, 50:8-10 (Lawless, confirming that Harris was Idearc’s attorney); YSB, Ex. F (Idearc email with draft Amendment). The introductory clause of the draft Amendment states that it “is made and entered into as of July 16, 2007. . . by and between Idearc Media Corp. f/k/a Verizon Directories Corp. (‘Idearc’) . . . and Ad Media Systems, Inc., f/k/a Yellow Pages Photos, Inc. (‘Ad Media’).” *Id.* The first recital reads: “WHEREAS, Idearc and Ad Media entered into that certain Service Contractor Agreement effective as of November 12, 2001 . . .” *Id.*

After receiving Ms. Harris’s revisions to the Amendment, Ms. Lawless sent it to Mr. Moore at 1:52 p.m. on July 17, 2007, with an email reading: “Attached is the draft amendment we spoke about. If you agree, please fill in your address and please sign two copies and send them to me . . .” YSB, Ex. G (Idearc emails with Mr. Moore). A few minutes later, Mr. Moore replied: “will review and send out by tomorrow.” *Id.*

The next email in the chain, sent at 4:20 p.m. on the same day, was from Ms. Lawless to Mr. Moore: “Attached is a revised version with the name corrected.” *Id.* The introductory clause of the revised draft replaces “AdMedia” with “YPPI,” stating that, “as of July 16, 2007,” the Amendment is between Idearc and “Yellow Pages Photos, Inc. (‘YPPI’).” *Id.* The first recital reads: “WHEREAS, Idearc and YPPI entered into that certain Service Contractor Agreement effective as of November 12, 2001” *Id.*

YPPI’s Filings in Other Lawsuits

In 2008 YPPI sued Yellow Book USA, Inc. and Pindar Set Inc., for copyright infringement. Opp., Ex. H (Complaint and Demand for Jury Trial, Injunctive Relief Sought⁶ (“Yellow Book Complaint”), ¶ 1). YPPI’s Yellow Book Complaint states:

On November 3, 2006, AdMedia changed its name from “Yellow Pages Photos, Inc.” to “AdMedia Systems, Inc.” [The new YPPI] was formed as “Yellow Pages Photos, Inc.” to continue the former yellow pages business of AdMedia; and AdMedia assigned to [the new YPPI] all right, title, and interest in and to the Works.

Id. at ¶ 16. In 2010 YPPI sued User-Friendly Phone Book, LLC and ASEC Group LLC for breach of contract and copyright infringement. Opp., Ex. I (Third Amended Complaint and Demand for Jury Trial, Injunctive Relief Sought⁷ (“User-Friendly Complaint”), ¶ 1). In regard to the corporate histories of AdMedia and YPPI, the User-Friendly Complaint used identical language to that in the Yellow Book Complaint. *Id.* ¶ 19. Similarly, in 2012 YPPI sued ZipLocal, LP, Yellow Pages Group, LLC, and Yellow Media Inc., for copyright

⁶ *Yellow Pages Photos, Inc. v. Yellow Book USA, Inc. and Pindar Set Inc.*, No. 08-930 (M.D. Fl. May 13, 2008).

⁷ *Yellow Pages Photos, Inc. v. User-Friendly Phone Book LLC and ASEC International Incorporated*, No. 10-436 (M.D. Fl. Feb. 16, 2010).

infringement and breach of contract (the latter claim only applied to ZipLocal). Opp., Ex. J (Complaint and Demand for Jury Trial, Injunctive Relief Sought⁸ (“ZipLocal Complaint”), ¶ 1). Once again, in regard to the corporate histories of AdMedia and YPPI, the ZipLocal Complaint used identical language to that in the Yellow Book Complaint. *Id.* ¶ 19. The licenses at issue in these cases did not contain provisions requiring YPPI to seek permission for assignments. Opp., Ex. K (YPPI Prior Litigation Licenses).

YPPI’s Filings in the SuperMedia Bankruptcy

SuperMedia and certain of its affiliates filed a prepackaged chapter 11 plan (the “Plan”) with the Court on March 18, 2013. Section 7.1 of the Plan stated:

[A]ll proofs of claim filed after the Effective Date [April 30, 2013] shall be disallowed and forever barred, estopped, and enjoined from assertion, and shall not be enforceable against any Reorganized Debtor.

Plan (Case No. 13-10545, D.I. 16). The Court confirmed the Plan on April 29, 2013; it went into effect the next day. Confirmation Order (Case No. 13-10545, D.I. 171). The Confirmation Order included a limited carve-out by which YPPI, and only YPPI, “preserve[d] all right to assert pre-petition claims, administrative expense claims, or Cure Claims as part of the post-confirmation litigation.” *Id.* at 13, ¶ 31. The carve-out makes no mention of AdMedia. *Id.*

Pursuant to the carve-out, YPPI filed a Proof of Claim on May 30, 2013 (“Proof of Claim”), asserting claims for breach of the License Agreement and copyright infringement. Opp., Ex. G (Proof of Claim). The Proof of Claim states:

⁸ *Yellow Pages Photos, Inc. v. ZipLocal, LP, Yellow Pages Group, LLC, and Yellow Media Inc.*, No. 12-755 (M.D. Fl. April 9, 2012).

1. Yellow Pages Photos, Inc. (“YPPI”), is a Florida corporation that is in the business of producing and licensing copyrighted photographic images.
2. On November 12, 2001, YPPI entered into a Service Contractor Agreement . . . with Verizon Directories Corp. . . .

Id., ¶¶ 1-2. Unlike YPPI’s Yellow Book (2008), User-Friendly (2010), and ZipLocal (2012) Complaints, the Proof of Claim mentions neither AdMedia, the formation of a new YPPI, nor the Assignment. *Opp.*, Ex G.

On May 30, 2013, YPPI also filed a Motion for Allowance and Payment of Administrative Expense Claim (“Expense Claim”), as well as a Motion to Compel Assumption or Rejection of Executory Contract (“Motion to Compel”). Expense Claim (Case No. 13-10545, D.I. 213); Motion to Compel (Case No. 13-10545, D.I. 212). Using identical language to that used in the Proof of Claim, these filings also assert that the YPPI of 2013 is the same as the YPPI of 2001. Expense Claim, ¶¶ 5-6; Motion to Compel, ¶¶ 5-6. On February 19, 2014, YPPI amended its Expense Claim (“Amended Expense Claim”), using virtually the same language as in its May 30, 2013 filings to assert that the 2013 YPPI is identical to the 2001 YPPI. Amended Expense Claim (Case No. 13-10546, D.I. 58), at 1, ¶¶ 9-10. Like the Proof of Claim, these filings mention neither AdMedia, the formation of a new YPPI, nor the Assignment.

Disclosure of the Formation of the New YPPI and the Assignment

YPPI first disclosed the existence of the new YPPI and the Assignment to SuperMedia in January 2014. 9/30/15 Tr. 54:5-55:12 (Richter). YPPI’s disclosure of the new YPPI was indirect, accomplished through the production of the Assignment. *Id.* The Assignment reads: “THIS ASSIGNMENT . . . is made as of the 3rd day of November, 2006,

by ADMEDIA SYSTEMS INC., a Florida corporation formerly known as Yellow Pages Photos, Inc. (“Assignor”), to YELLOW PAGES PHOTOS, INC., a Florida corporation (“Assignee”).” Opp., Ex. E (Assignment). Mr. Moore signed the Assignment twice, as President of AdMedia and as President of YPPI. *Id.* The document provides no other information about the respective corporate histories of AdMedia and YPPI, such as when Old YPPI was renamed AdMedia, or when YPPI was formed. *Id.* YPPI did not disclose the existence of the new YPPI or the Assignment to the Court.

In Mr. Moore’s deposition in February 2014, YPPI once again disclosed to SuperMedia, but not to the Court, the existence of the new YPPI. 9/30/15 Tr. 55:13-56:6 (Richter). Mr. Moore explained that AdMedia and YPPI were separate companies. *Id.* 55:17-22 (Richter quoting Mr. Moore’s February 2014 deposition).

AdMedia’s and the new YPPI’s respective corporate histories were disclosed to both SuperMedia and the Court on April 7, 2014, when YPPI filed its Trial Brief (“YTB”) with a footnote on the first page stating:

On November 3, 2006, the Florida corporation then named Yellow Pages Photos, Inc. changed its name to AdMedia Systems, Inc. and transferred its business and copyrights to a new Florida corporation named Yellow Pages Photos, Inc. The two corporations were commonly owned, and the business known as “Yellow Pages Photos” or “YPPI” has continuously operated. Yellow Pages Photos, Inc. refers to that business in this Trial Brief, both pre- and post-transfer, as “Yellow Pages.”

YTB at 1.

Mr. Moore’s July 28, 2015 Deposition

On July 28, 2015, SuperMedia deposed Mr. Moore. In reference to the 2007 Amendment negotiations, Mr. Moore made the following four disclosures: (1) he never

told anyone at Verizon that he had formed a new YPPI (Moore Dep. 255:14-19); (2) he never told Verizon about the Assignment (*id.* 255:22-24); (3) he did not know whether he had assigned AdMedia's License rights to the new YPPI (*id.* at 256:9-12, 258:12-259:4); and (4) he never asked for Verizon's consent to assign any of AdMedia's rights, whether copyrights or License rights, to the new YPPI (*id.* at 260:6-19).

Cross-motions for Summary Judgment

Following Mr. Moore's deposition, on August 14, 2015, YPPI moved for summary judgment, seeking attorneys' fees under the Copyright Act and §16 of the License Agreement. YPPI's Motion for Summary Judgment (D.I. 70) at 24-26. Also on August 14, SuperMedia cross-moved for summary judgment on YPPI's request for attorneys' fees, asserting that Mr. Moore's July 28, 2015 testimony demonstrated that the new YPPI is not a party to the License Agreement and therefore is not entitled to attorneys' fees under § 16. SuperMedia's Memorandum of Law in Support of Its Motion for Summary Judgment (D.I. 72) at 1.

On August 25, 2015, Mr. Moore filed a request with the Florida Secretary of State to reinstate AdMedia after it had administratively dissolved the company on September 26, 2014, for failure to file its annual report. Opp., Ex. L (AdMedia dissolution), Ex. M (AdMedia Reinstatement).

SuperMedia filed its Motion for Leave to Amend Its Adversary Complaint ("Motion to Amend") (D.I. 79), on September 4, 2015, in order to allege that YPPI is not a party to the License Agreement. In a bench ruling on September 30, 2015, the Court granted SuperMedia's Motion to Amend, while simultaneously allowing YPPI to amend

its Proof of Claim “to respond to this, what is otherwise a fairly late amendment to [SuperMedia’s] pleadings.” 9/30/15 Tr. 235:19-21(Berman), 236:20-237:6, 237:18-238:3 (Berman, Court). YPPI also requested and received limited supplemental discovery on the issue of whether it is a party to the License Agreement. *Id.* 128:19-129:4 (Richter), 237:14-16 (Court).

On October 16, 2015, YPPI deposed Ms. Lawless. Opp., Ex. O (10/16/15 Lori Lawless Deposition (“Lawless Dep.")). She testified that: (1) Mr. Moore never told her that he had incorporated a new YPPI (*id.* 100:10-22), (2) prior to the instant litigation, she had no idea that Mr. Moore had incorporated a new YPPI (*id.* 100:23-101:5), and (3) it was her “understanding that [the Amendment] was between Idearc on the one hand and the original Yellow Pages Photos, Inc. that had entered the 2001 agreement with Verizon on the other hand” (*id.* 101:6-14, quoting question posed by SuperMedia’s counsel, Mr. Huang).

On October 23, 2015, YPPI filed a proposed Amended Proof of Claim. YPPI’s Notice of Filing of Amended Proof of Claim (“YNF”) (D.I. 113) Ex. A (Amended Proof of Claim (“Amended Proof of Claim”)). The Amended Proof of Claim explained that AdMedia “was formerly named and did business as ‘Yellow Pages Photos, Inc.’ [o]n or about November 12, 2001, AdMedia (then known as “Yellow Pages Photos, Inc.”) and Verizon Directories Corp. . . . entered into a certain Service Contractor Agreement . . .” YNF, Ex. A ¶¶ 2-4. The Amended Proof of Claim did not join AdMedia as a claimant. YNF, Ex. A.

On October 27, 2015, the Court issued a Memorandum Opinion (“2015 Opinion”) (D.I. 115) on the parties’ motions for summary judgment. The Court denied YPPI’s summary judgment motion for attorneys’ fees under the License Agreement, noting two unresolved material issues of fact: (1) “did YPPI become the ‘Contractor’ under the License Agreement,” and (2) “did SuperMedia understand it was doing business with YPPI after July 2007?” *Id.* at 17.

On November 4, 2015, YPPI filed the Motion. Unlike its October 23, 2015 YNF, the Motion did not include a proposed Amended Proof of Claim.

On November 16-18, 2015, the Court held a three-day trial on YPPI’s alleged damages. Ms. Lawless testified that she did not know that AdMedia and the new YPPI were separate companies when she was negotiating the Amendment. 11/17/2015 Tr. 103:17-20 (Lawless). Mr. Moore testified: (1) that he did not ask Verizon’s permission before assigning AdMedia’s License rights to the new YPPI (11/18/15 Tr. 12:7-10 (Moore)); (2) that he does not recall telling Verizon about assigning AdMedia’s License rights to the new YPPI (*id.* 12:11-22); and (3) that he does not know if AdMedia did, in fact, assign its License rights to the new YPPI (*id.* 13:17-21). He also confirmed that in his 7/28/15 deposition, he had testified that he did not tell anyone at Verizon that he had formed a new YPPI. *Id.* 276:4-12.

DISCUSSION

Motion to Amend Standard

The Court may deny leave to amend when it finds “[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by

amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [5] futility of the amendment, etc.” *Furman Lumber, Inc. v. Mountbatten Sur. Co.*, No. CIV. A. 96-7906, 1997 WL 397496, at *1 (E.D. Pa. July 9, 1997), quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962). Prejudice to the non-moving party is the touchstone of whether to permit amendment, and significant delay – unjustified or undue – is sufficient prejudice to deny the motion to amend. *Zen Ins. v. Unbreakable Lock Co.*, 276 F. App’x 200, 202 (3d Cir. 2008); *CMR DN Corp. v. City of Philadelphia*, 703 F. 3d 612, 629 (3d Cir. 2013). A Court may deny leave to amend on the basis of any one individual reason, but it may also base its denial on several reasons combined. *Rizzo v. PPL Serv. Corp.*, No. CIV.A. 03-5779, 2005 WL 1397217, at *5 (E.D. Pa. June 10, 2005).

Here, the Court finds undue delay, bad faith, undue prejudice and futility of amendment. The Court holds that each of these reasons is sufficient, on its own, to deny the Motion.

Undue Delay

“[T]he question of undue delay requires that we focus on the movant's reasons for not amending sooner.” *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001). Courts may “deny a motion in order to forestall strategies that are ‘contrary to both the general spirit of the federal rules and the liberal amendment policy of Rule 15(a).’” *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 630 (3d Cir. 2013) (citations omitted). The Third Circuit has “refused to overturn denials of motions for leave to amend where the moving party offered no cogent reason for the delay in seeking the amendment.” *CMR DN Corp. v. City of Philadelphia*, 703 F. 3d 612, 629 (3d Cir. 2013). Delay

may also become undue when a movant sits on the factual information on which the proposed amendment relies, has failed to take previous opportunities to amend the complaint, or waits until “after briefing was completed on the summary judgment motion . . . i.e., when the proverbial writing was on the wall.” *In re Vertis Holdings, Inc.*, 536 B.R. 589, 613 (Bankr. D. Del. 2015); *see also Jang v. Boston Sci. Scimed, Inc.*, 729 F.3d 357, 368 (3d Cir. 2013)(denying motion to amend because of undue delay when plaintiff offered no cogent reason for not amending sooner and waited until after judgment before seeking to amend, having taken “a wait-and-see approach to pleading”); *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir.2006) (“When a party fails to take advantage of previous opportunities to amend, without adequate explanation, leave to amend is properly denied.”); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir.1996) (finding undue delay because “most of the facts were available to plaintiff ... before she filed her original complaint ... [and because plaintiff] had numerous opportunities to correct any deficiencies in her ... claim but failed to take advantage of them”).

YPPI’s knowledge that AdMedia is the Proper Claimant

The Court finds that YPPI’s Motion manifests undue delay. Throughout this litigation YPPI has known, or should have known, that AdMedia is the proper claimant for its claims regarding breach of the License Agreement. On or about November 16, 2001, on behalf of Old YPPI, Mr. Moore entered into the License Agreement with Verizon. Opp., Ex. B (License Agreement). On November 3, 2006, he changed the name of Old YPPI to AdMedia, incorporated a new company named YPPI, and assigned all of AdMedia’s copyrights to the new YPPI. 11/18/15 Tr. 8:5-7, 9:9-12, 10:2-13 (Moore); Opp.,

Ex. C (Old YPPI Articles of Incorporation), Ex. D (YPPI Articles of Incorporation), Ex. E (Assignment of Copyrights). Mr. Moore, however, cannot remember ever having assigned AdMedia's License rights to the new YPPI. Moore Dep. 258:12-259:4⁹ Nor did he ever ask for Verizon's consent to assign AdMedia's License rights. *Id.* 260:13-19. Moreover, the July 2007 Amendment contains no features, such as the terms "assignment," "assignor," "assignee," or Mr. Moore's signature on behalf of both AdMedia and the new YPPI, that would indicate that the Amendment functioned as an assignment of AdMedia's License rights or a substitution of the new YPPI for AdMedia. 11/18/15 Tr. 15:11-13, 16:25-17:1, 19:14-16, 19:20-21 (Moore).

Ms. Lawless has repeatedly provided additional evidence that the Amendment was neither an assignment nor a substitution of the parties, and that Mr. Moore knew this. 11/17/15 Tr. 56:25-57:3 (Lawless). She testified that Mr. Moore never told her that he had formed a second company called YPPI. 11/17/15 Tr. 52:19-22 (Lawless). Throughout the July 2007 negotiations, she thought that Mr. Moore had only one company, that YPPI and AdMedia "were the same company; it was simply a name change." 11/17/15 Tr. 49:18-23 (Lawless). This is consistent with her prior testimony: "[Mr. Moore] let me know that the company was in fact still named Yellow Pages Photo, Inc." 4/10/14 P.M. Tr. 103:20-24 (Lawless). It is also consistent with the documentary evidence. Ms. Lawless's initial draft Amendment refers to "AdMedia Systems, Inc. f/k/a Yellow Pages Photos, Inc." YSB, Ex. F (Idearc email with draft Amendment). Her second

⁹ See also *id.* 256:9-12, and 11/18/15 Tr. 13:17-21 (Moore).

draft of the Amendment references “YPPI” as Idearc’s counterparty to the License Agreement in both 2001 and 2007, demonstrating that she thought there was only one YPPI. YSB, Ex. G (Idearc emails with Mr. Moore).

The evidence demonstrates that Mr. Moore - and therefore YPPI - has known, or should have known, since 2007 that AdMedia owns the License rights, and that therefore only AdMedia could possibly be a claimant against SuperMedia under the License Agreement. YPPI explains the late timing of the Motion as “dictated by SuperMedia’s own late amendment of its Adversary Complaint,” and asserts that any delay was due to the “mutual mistake with respect to the identity of the proper party – which mistake was made by both Yellow Pages and SuperMedia . . .” Reply at 12, 13. There was no mistake, however. YPPI has known, or should have known, that AdMedia never assigned its License rights. If SuperMedia’s Motion to Amend came late in this litigation, this was due to Mr. Moore concealing, until his July 2015 deposition, that he had not assigned AdMedia’s License rights to YPPI. SuperMedia’s September 4 Motion to Amend did not dictate the timing of YPPI’s November 4 Motion. Rather, YPPI chose to forego the opportunity to join AdMedia during the nearly two and a half years since filing its Proof of Claim, opting instead to wait and see if it could obtain attorney’s fees on the theory that YPPI was the party to the License Agreement. On October 27, 2015 the Court denied YPPI’s summary judgment motion for attorney’s fees under the License Agreement. 2015 Opinion at 20. YPPI filed its Motion on November 4, 2015. *See Cureton v. Nat’l Collegiate Athletic Ass’n*, 252 F.3d 267, 273-74 (3d Cir. 2001) (affirming district court’s denial of leave to amend on grounds of undue delay, when plaintiffs’ only real reason “for the

substantial lapse in time was plaintiffs' misplaced confidence in their original . . . theory," and "the motion was filed three years after the complaint was filed . . . [and] the factual information on which the proposed amendment relied was known almost two-and-a-half years before plaintiffs sought leave to amend"). Having been in possession, at all times during this litigation, of the fact that Mr. Moore has no recollection of having ever assigned AdMedia's License rights, YPPI has subjected SuperMedia and the Court to undue delay since the day it filed its Proof of Claim. The Court finds that YPPI's "wait and see" litigation strategy is contrary to both the general spirit of the federal rules and the liberal amendment policy of Rule 15(a). *CMR*, 703 F.3d at 630.

Bad Faith

"As with undue delay, in assessing bad faith, courts look to the reasons as to why a party did not seek to amend earlier." *In re Vertis Holdings, Inc.*, 536 B.R. 589, 616 (Bankr. D. Del. 2015). "[P]rejudice is not an absolute requirement under Rule 15. . . . undue delay combined with bad faith is enough to justify a denial of a motion to amend." *Trans Video Elecs., Ltd. v. Sony Elecs., Inc.*, 278 F.R.D. 505, 509-10 (N.D. Cal. 2011) *aff'd*, 475 F. App'x 334 (Fed. Cir. 2012).

Mr. Moore's Bad Faith in 2006-2007

The July 2007 Amendment required Mr. Moore to do the following: (1) disclose to Idearc that he changed the name of Old YPPI to AdMedia (License Agreement § 7(h)); (2) get permission from Idearc to assign AdMedia's copyrights to the new YPPI (*id.* §§ 7(e), 16); and (3) inform Idearc once the permitted assignment had been executed (*id.* § 7(h)).

Requirements (2) and (3) entailed a fourth requirement: that he disclose to Idearc that he had incorporated a new YPPI.

Of these four requirements, Mr. Moore performed only one: he informed Idearc, by May 2007, that he had changed the name of Old YPPI to AdMedia. Moore Dep. 253:22-254:5; YSB at 3, Ex. E (Idearc emails); 11/17/15 Tr. at 42:25-43:2, 49:1-2, 71:11-16, 83:9-23 (Lawless). He failed to get Idearc's permission to assign AdMedia's copyrights to the new YPPI. 11/18/15 Tr. 12:7-10 (Moore). He told Idearc neither about the copyright assignment, nor about the formation of the new YPPI. 11/18/15 Tr. 276:4-12 (Moore); 11/17/15 Tr. 103:17-20 (Lawless). Indeed, the evidence indicates that he actively concealed the Assignment and the formation of a new YPPI because he had not gotten permission from Idearc for the Assignment.

The Amendment provides further evidence of Mr. Moore's concealment. On July 16, 2007, Ms. Lawless sent a draft amendment to her Idearc colleague, attorney Sue Harris, stating: "I'm not sure how to word it. Please see attached." 11/17/15 Tr. 41:19-20, 50:8-10 (Lawless, confirming that Harris was Idearc's attorney); YSB, Ex. F (Idearc email with draft Amendment). The introductory clause of the draft Amendment states that it "is made and entered into as of July 16, 2007. . . by and between Idearc Media Corp. f/k/a Verizon Directories Corp. ('Idearc') . . . and Ad Media Systems, Inc., f/k/a Yellow Pages Photos, Inc. ('Ad Media')." *Id.* The first recital reads: "WHEREAS, Idearc and Ad Media entered into that certain Service Contractor Agreement effective as of November 12, 2001 . . ." *Id.* This draft amendment demonstrates that Ms. Lawless understood that Old YPPI had changed its name to AdMedia, just as Verizon had changed its name to

Idearc. Idearc and AdMedia were the parties that entered into the License Agreement on November 12, 2001, and they were the same parties amending the Agreement in July 2007.

After receiving Ms. Harris's revisions to the draft Amendment, Ms. Lawless sent it to Mr. Moore at 1:52 p.m., on July 17, 2007, with an email reading: "Attached is the draft amendment we spoke about. If you agree, please fill in your address and please sign two copies and send them to me . . ." YSB, Ex. G (Idearc emails with Mr. Moore). A few minutes later, Mr. Moore replied: "will review and send out by tomorrow." *Id.*

The next email in the chain, sent at 4:20 p.m. on the same day, was from Ms. Lawless to Mr. Moore: "Attached is a revised version with the name corrected." *Id.* The attached revised draft replaces "AdMedia" with "YPPI," stating that, "as of July 16, 2007," the Amendment is between Idearc and "Yellow Pages Photos, Inc. ("YPPI")." *Id.* The first recital reads: "WHEREAS, Idearc and YPPI entered into that certain Service Contractor Agreement effective as of November 12, 2001 . . ." *Id.* This revised version – the version eventually signed by Mr. Moore and Idearc's Director of Internet Ops – demonstrates that Ms. Lawless still thought the parties were the same. 11/17/15 Tr. 49:18-23, 52:17-22 (Lawless). Idearc and YPPI had entered into the License Agreement in 2001, and the same parties were amending the Agreement in 2007.

The lack of additional emails in the chain strongly suggests that Mr. Moore's revisions were communicated over the phone, as Ms. Lawless has testified. 11/17/15 Tr. 50:21-23, 51:14-17, 84:14-87:8 (Lawless). It does not seem plausible that a change in party was accomplished in just over two hours by a phone call, as YPPI posits. YSB at 12;

11/17/15 43:19-20 (Timmerman). Indeed, all available evidence indicates that the Amendment did not operate as an assignment or substitution of the parties.¹⁰ The Amendment makes no mention of “assignment,” “assign,” “assignor,” “assignee” “substitute,” or “substitution.” 11/18/15 Tr. 18:4-7 (Moore); Opp., Ex. B (License Agreement). Ms. Lawless testified that if a vendor, such as AdMedia, were to request permission from Idearc to assign an agreement, Idearc would always obtain a “W-9” tax form for the assignee to ensure that future contractual payments would go to “the new company.” 11/17/15 Tr. 53:8-20, 22-24 (Lawless). Ms. Lawless did not request a W-9 from Mr. Moore because the Amendment was not an assignment of the License Agreement. *Id.* 55:3-5, 56:25-57:3 (Lawless).

Furthermore, when Idearc permitted assignments, the agreement would be signed by three parties: (1) Idearc, (2) the original party to the agreement, and (3) the company to which the agreement was being assigned. *Id.* at 57:9-15 (Lawless). Mr. Moore followed a similar assignment procedure: when he assigned AdMedia’s copyrights to the new

¹⁰ Ms. Lawless’s deposition transcript suggests that, for purposes of her testimony, “assignment” and “substitution” are interchangeable terms:

[Mr. Leon’s question to Ms. Lawless:] Was it your understanding that the amendment in 2007 was an *assignment* of the license agreement?”

MS. RICHTER: Objection, Your Honor. Now we are asking for a legal conclusion, whether this document was effective to essentially *substitute* one party into a contract for another, which is about the same thing as an *assignment*. *Assignments* can be done in more than one way. And what Ms. Lawless is being asked to testify to is to whether this document, this amendment, was effective essentially to be an *assignment*.

11/17/15 Tr. 55:6-15 (Leon, Richter) (emphasis added); *see also id.* 56:14-18 (Timmerman, stating: “So I think what the question is soliciting is an answer that I thought that this was just an amendment, not an *assignment*, and that is a legal conclusion as to whether this document was sufficient to *substitute* one party for another, as a party to our agreement” (emphasis added)).

YPPI, he signed the Assignment on behalf of both the “Assignor” (AdMedia) and the “Assignee” (new YPPI) because he believed doing so was necessary to make the assignment valid. 11/18/15 Tr. 16:5-17:1 (Moore). Neither Idearc nor Mr. Moore followed any of these procedures when executing the Amendment, indicating that neither party intended an assignment or substitution, or took any steps to effectuate one. 11/17/15 Tr. 56:25-57:3 (Lawless).

Thus, the drafting history of the Amendment provides additional evidence that Mr. Moore intended to conceal the new YPPI and surreptitiously accomplish the assignment or substitution that § 12 of the License Agreement would not permit, absent Idearc’s consent. During the July 2007 negotiations, he asked Ms. Lawless to revert the name of his company back to “YPPI,” without telling her that he had created a new YPPI. 11/17/15 Tr. 52:19-22 (Lawless); 11/18/15 Tr. 275:6-276:12 (Moore). Consequently, she thought that he had only one company, that YPPI and AdMedia “were the same company; it was simply a name change.” 11/17/15 Tr. 49:18-23 (Lawless). Nor did he inform her that he had assigned the copyrights to the new YPPI. 11/18/15 Tr. 12:7-22 (Moore). Only he knew that the introductory clause of the Amendment referred to the new YPPI (a company Ms. Lawless did not even know existed), while the first recital referred to the Old YPPI. Given the review procedures in place at Idearc for approval of vendor contracts – including attorney review – it seems unlikely that either Ms. Lawless or anyone else at Idearc would have allowed such an inconsistent and deceptive use of the abbreviation “YPPI” in the Amendment. 11/17/15 Tr. 41:19-21, 50:5-17, 50:24-51:13, 52:23-54:3, 55:3-5, 57:5-15 (Lawless, regarding various review procedures).

YPPI's Bad Faith During the SuperMedia Bankruptcy Litigation

In the course of asserting and litigating its claim, YPPI has misrepresented that the YPPI before the Court is the company that entered into the License Agreement in 2001, and therefore is a party to the License Agreement. YPPI has also actively concealed facts from the Court and SuperMedia that are essential to adjudicating the issues in this Adversary Proceeding: (1) on November 3, 2006, Mr. Moore changed the name of Old YPPI to AdMedia; (2) on the same day, he incorporated a new YPPI; (3) also on the same day, he assigned AdMedia's copyrights to YPPI; and (4) he never assigned AdMedia's License rights to YPPI. With discovery, YPPI has been forced to correct its misrepresentations and disclose the facts it previously concealed. It has done so, however, reluctantly, furtively and with delay. It has not explicitly alerted the Court or SuperMedia to its misrepresentations and concealments, even though both the Court and SuperMedia continued to rely on them.

YPPI's Complaints in Other Lawsuits

Earlier in this Memorandum Opinion, the Court cited to several lawsuits YPPI brought against Yellow Book USA, Inc., Pindar Set, User-Friendly Phone Book, ASEC Group, ZipLocal, Yellow Pages Group and Yellow Media. The Complaints all state that:

On November 3, 2006, AdMedia changed its name from "Yellow Pages Photos, Inc." to "AdMedia Systems, Inc." [The new YPPI] was formed as "Yellow Pages Photos, Inc." to continue the former yellow pages business of AdMedia; and AdMedia assigned to [the new YPPI] all right, title, and interest in and to the Works.

The licenses at issue in these cases did not contain provisions requiring YPPI to seek permission for assignments. Opp. Ex. K (YPPI Prior Litigation Licenses). Therefore,

the Assignment did not violate these licenses, and as a result, the Yellow Book, User-Friendly, and ZipLocal Complaints fully disclosed that AdMedia assigned its copyrights to a newly-formed YPPI. Opp. at 5. In the instant case, however, disclosure of the Assignment would have risked SuperMedia declaring it void under § 12 of the License Agreement, and may have exposed YPPI to a breach of contract claim.

YPPI's Misrepresentations and Concealments

In contrast to its filings in other cases, YPPI's Proof of Claim, filed on May 30, 2013, states:

1. Yellow Pages Photos, Inc. ("YPPI"), is a Florida corporation that is in the business of producing and licensing copyrighted photographic images.
2. On November 12, 2001, YPPI entered into a Service Contractor Agreement . . . with Verizon Directories Corp. . . .

Id., ¶¶ 1-2. Unlike YPPI's Yellow Book (2008), User-Friendly (2010), and ZipLocal (2012) Complaints, the Proof of Claim mentions neither AdMedia, the formation of a new YPPI, nor the Assignment. Opp., Ex G.

On May 30, 2013, YPPI also filed its Expense Claim, as well as its Motion to Compel. Using identical language to that used in the Proof of Claim, these filings fail to mention AdMedia, formation of a new YPPI, or the Assignment, asserting instead that the YPPI of 2013 is the same as the YPPI of 2001.

Comparing YPPI's filings in its other lawsuits to those here, it is clear that YPPI has deliberately filed pleadings in this Court that contain misrepresentations and conceal material facts.

YPPI's Misrepresentations and Concealments Misled the Court

On October 9, 2013, the Court issued a Memorandum Opinion on YPPI's Expense Claim and Motion to Compel ("2013 Opinion"), which refers to the party before the Court as "Yellow Pages Photos, Inc. ('YPPI')" and notes that "[o]n November 12, 2001, YPPI entered into an agreement . . . with Verizon Directories Corp. . ." 2013 Opinion at 1 (Case No. 13-10545, D.I. 280). YPPI made no effort to correct the Court's misunderstanding of the factual record.

Three months later, in January 2014, YPPI disclosed for the first time to SuperMedia - but not to the Court - that Mr. Moore had formed a new YPPI in November 2006 and assigned AdMedia's copyrights to it. 9/30/15 Tr. 54:5-13 (Richter). The disclosure occurred when YPPI produced the Assignment. *Id.* In his February 2014 deposition, Mr. Moore disclosed for the second time to SuperMedia - but not to the Court - that YPPI and AdMedia were two separate companies. 9/30/15 Tr. 55:13-56:5(Richter).

To the Court, YPPI continued to maintain that the Old YPPI and the new YPPI were one and the same. On February 19, 2014, YPPI amended its Expense Claim ("Amended Expense Claim"), using virtually the same language as in its May 30, 2013 filings, which asserted that the 2013 YPPI is identical to the 2001 YPPI. Amended Expense Claim at 1, ¶¶ 9-10 (Case No. 13-10546, D.I. 58). Like the Proof of Claim, this filing mentions neither AdMedia, the formation of a new YPPI, nor the Assignment.

AdMedia's and the new YPPI's respective corporate histories were first disclosed to the Court on April 7, 2014, when YPPI filed its Trial Brief with a footnote on the first page stating:

On November 3, 2006, the Florida corporation then named Yellow Pages Photos, Inc. changed its name to AdMedia Systems, Inc. and transferred its business and copyrights to a new Florida corporation named Yellow Pages Photos, Inc. The two corporations were commonly owned, and the business known as "Yellow Pages Photos" or "YPPI" has continuously operated. Yellow Pages Photos, Inc. refers to that business in this Trial Brief, both pre- and post-transfer, as "Yellow Pages".

YTB at 1 (Case No. 13-10545, D.I. 107). Although the footnote disclosed three facts previously concealed by YPPI (name change of Old YPPI to AdMedia, formation of new YPPI, the Assignment), it failed to mention that Mr. Moore never assigned AdMedia's License rights. The footnote continued YPPI's misdirection by implying that all of AdMedia's rights - License rights and copyrights - had been assigned to the new YPPI and that there was no meaningful distinction between the Old YPPI and the new one: AdMedia "transferred its *business* and copyrights" to the new YPPI; "the business known as . . . 'YPPI' has continuously operated," and therefore the Trial Brief "refers to that business . . . *both pre- and post-transfer*, as Yellow Pages." *Id.* (emphasis added).

Furthermore, YPPI made no effort to bring either the Court's or SuperMedia's attention to its unduly delayed disclosures, which it had inconspicuously placed in a footnote. As a result, both the Court and SuperMedia remained unaware of the disclosures and continued to have an erroneous understanding of the factual record. *See In re SuperMedia, Inc.*, No. 13-10546(KG), 2014 WL 7403448, at *1 (Bankr. D. Del. Dec. 29, 2014) *appeal dismissed sub nom. In re SuperMedia, LLC*, No. BR 13-10546-KG, 2015 WL

4720579 (D. Del. Aug. 7, 2015) (“The Court is issuing a post-trial ruling on the request by Yellow Pages Photos, Inc. (‘YPPI’). . . . On or about November 12, 2001, Verizon Directories Corp. (a predecessor to SuperMedia) and YPPI entered into a Service Contractor Agreement . . .”); SuperMedia’s Amended Complaint, filed 1/29/15, at ¶¶ 5, 7 (D.I. 5) (“Defendant Yellow Pages Photos, Inc. (‘YPPI’) On or about November 12, 2001, SuperMedia’s predecessor company, Verizon Directories Corp. . . . entered into a Service Contractor Agreement with YPPI . . .”). YPPI’s footnote falls far short of an appropriate disclosure.

The above chronology indicates that in this litigation, YPPI has perpetuated the deception Mr. Moore began in July 2007. In its filings YPPI omitted mention of AdMedia and the Assignment, apparently because to do so would reveal YPPI’s breach of the License Agreement as well as Mr. Moore’s deceptive replacement of the Old YPPI with the new YPPI in the Amendment. In other lawsuits, where the license agreements in question did not have anti-assignment provisions, YPPI freely revealed the existence of AdMedia, the new YPPI, and the Assignment. On the above findings, the Court finds bad faith on the part of Mr. Moore and YPPI.

Undue Prejudice

“[S]ubstantial or undue prejudice to the non-moving party is a sufficient ground for denial of leave to amend.” *Cureton v. Nat’l Collegiate Athletic Ass’n*, 252 F.3d 267, 273 (3d Cir. 2001). “Specifically, we have considered whether allowing an amendment would result in additional discovery, cost, and preparation to defend against new facts or new theories.” *Id.*; see also *In re Vertis Holdings, Inc.*, 536 B.R. 589, 612 (Bankr. D. Del.

2015)(denying leave to amend upon finding of undue prejudice when defendants “would be forced to engage in substantial additional discovery, work that could have been accomplished in connection with the extensive discovery the parties have already undertaken”).

SuperMedia maintains that the addition of AdMedia would require reopening discovery to explore (1) “AdMedia’s financial condition;” (2) “the relationship between AdMedia and the new YPPI;” (3) “the reasons why AdMedia transferred its copyrights to the new YPPI;” (4) “any damages allegedly suffered by AdMedia as a result of SuperMedia’s transfers of YPPI’s images;” (5) “any financial interest AdMedia may have in YPPI’s images;” (6) “AdMedia’s ownership of other copyrights;” (7) “AdMedia’s lines of business and prior transactions;” (8) “the reasons why AdMedia was dissolved in September 2014 . . . and . . . reinstated in August 2015.” Opp. at 18. SuperMedia further contends that it will need to retain an expert to opine on the damages suffered by AdMedia as a result of SuperMedia’s transfers, and that another damages trial will be necessary. *Id.* All of this would entail a waste of the resources SuperMedia has already expended on discovery, summary judgment briefing, and trial. *Id.* at 18-19.

YPPI insists that reopening discovery and holding a second damages trial will not be necessary. Reply at 11-12. YPPI notes that its proposed amendment “would not be prejudicial because those issues ‘were the subject of weeks of vigorous discovery.’” *Id.* at 13 (quoting SuperMedia’s Motion to Amend at 6). A second damages trial is also not necessary because “the request to amend merely seeks the nominal addition of AdMedia to its existing breach of contract claim” *Id.* Unlike the cases cited by SuperMedia,

where requests to amend sought to add either unforeseen parties or alter claims, YPPI “seeks only the nominal addition of AdMedia on the Proof of Claim . . . [which] would simply mean correction of a mutual mistake with respect to identity of the proper party – which mistake was made by both Yellow Pages and SuperMedia . . .” *Id.* at 12. YPPI cites *Nelson v. County of Allegheny* for the rule that amendment will not be deemed prejudicial when defendant “knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought with the original claims.” 60 F.3d 1010, 1014-15 (3d Cir. 1995); Reply at 12-13.

YPPI’s argument fails because there was no “mistake” of identity here. Throughout this litigation, YPPI has known, or should have known, that AdMedia is the proper claimant under the License Agreement. But for YPPI’s concealment, SuperMedia would have known this as well from the day YPPI filed its Proof of Claim.

The Court concludes that adding AdMedia would require reopening discovery, and likely a new damages trial. YPPI’s argument that AdMedia is simply a nominal addition and will effect a mere “switching out” of one party for another, is not a realistic assessment of the consequences of adding AdMedia as claimant. Reply at 18. The Court finds undue prejudice to SuperMedia. *Vertis*, 536 B.R. at 612 (“Plaintiff’s position that no new discovery will be required is divorced from reality”).

Futility of Amendment

“Futility means that the complaint, as amended, would fail to state a claim upon which relief could be granted.” *Vertis*, 536 B.R. at 617 (quotations and citations omitted). The standard for assessing futility is the “same standard of legal sufficiency as applies

under [Federal] Rule [of Civil Procedure] 12(b)(6). . . . made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012(b).” *Id.* A complaint “must contain either direct or indirect allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.” *Id.* The Court, in order to determine whether a claim meets this requirement, must “draw on its judicial experience and common sense.” *Id.*

If the Court grants leave to amend, YPPI’s Proof of Claim would only allege contract damages on behalf of AdMedia. Reply at 14. As the License Agreement is governed by Texas law, a four-year statute of limitations applies to breach of contract claims. Tex. Civ. Prac. & Rem. Code Ann. § 16.051 (West)(“Every action for which there is no express limitations period . . . must be brought not later than four years after the day the cause of action accrues.”).

YPPI and SuperMedia dispute when the statute of limitations would have run for AdMedia’s contract claims – whether February or December 2014. The dispute is irrelevant since without the relation back doctrine in its favor, the Texas limitations statute will bar AdMedia from asserting its claims. Thus, the relevant dispute is whether AdMedia’s claims relate back to YPPI’s May 30, 2013 Proof of Claim.

Pursuant Fed. R. Civ. P. to Rule 15(c)(1)(C) AdMedia can be added as a claimant if SuperMedia “(A) has received such notice of the institution of the action that [it] will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against [it]” *Nelson v. City of Allegheny*, 60 F. 3d 1010, 1014 (3d Cir. 1995). “[T]he ‘prejudice’ to which the Rule refers is that suffered by one who, for lack of

timely notice that a suit has been instituted, must set about assembling evidence and constructing a defense when the case is already stale.” *Id.* (citations omitted).

YPPI says that the first prong “is not of concern here, as the virtual identity of AdMedia and Yellow Pages—and the effective assumption by AdMedia of the exact breach of contract claims initially asserted by Yellow Pages—eliminates any risk of prejudice to SuperMedia on account of lack of notice or delay.” Reply at 18. YPPI argues that AdMedia would also pass the second prong of the test since “there can be no doubt that SuperMedia ‘knew or should have known’ that AdMedia would pursue a claim for breach of the License Agreement but for the mistaken identity as to the appropriate claimant.” *Id.*

SuperMedia responds that Rule 15(c)(1)(C) will not save AdMedia’s claims because relation back “does not save the claims of complainants who have sat on their rights.” *Nelson*, 60 F.3d at 1015 (3d Cir. 1995). In *Nelson*, the court affirmed the district court’s dismissal of plaintiffs’ claims because “Defendants did not know, nor should they have known before the expiration of the limitations period that, but for a mistake, they would have been sued directly by these plaintiffs.” *Id.* The court held that plaintiffs “sat on their rights” and “seek to take advantage of the [relation back] rule to perform an end-run around the statute of limitations that bars their claims.” *Id.*

Nelson applies to the facts here. As discussed above, YPPI’s ostensible failure to recognize AdMedia as the proper claimant for claims under the License Agreement was not a mistake, either on YPPI’s or SuperMedia’s part. Rather, it was part and parcel of YPPI’s strategy of “the mere ‘switching out’ of one of Trent Moore’s wholly owned

companies for another.” Reply at 18. YPPI’s deception delayed SuperMedia’s discovery of AdMedia as the proper plaintiff until the deposition of Mr. Moore on July 28, 2015. SuperMedia did not know, nor should it have known, before the expiration of the limitations period (either February or December 2014), that it would be sued directly by AdMedia. AdMedia sat on its rights for strategic reasons and is now attempting to perform an end-run around the statute of limitations that bars its contract claims. *See Painter Family Investments, LTD., L.L.P. v. Underwriters at Lloyds, Syndicate 4242 Subscribing to Policy No. 42-7560009948-L-00*, 836 F. Supp. 2d 484, 500 (S.D. Tex. 2011)(holding that plaintiff APC could not be added to plaintiff PFI’s complaint under the relation back rule, even though both companies were owned by the same individual and the claims arose from “the same conduct or occurrence,” because defendant Lloyds “did not receive adequate notice of APC’s claim . . . [and] APC is a separate legal entity, owning separate properties, with separate claims from those rightfully asserted by PFI.”).

Thus, the Court holds that it would be futile for YPPI to join AdMedia as a claimant on its Proof of Claim.

Informal Proof of Claim

As an alternative to a formal grant of leave to amend, YPPI “submits that it is equally appropriate for the Court to treat AdMedia as having already filed an informal proof of claim in this case by and through Yellow Pages’ Proof of Claim.” Motion at 7. Bankruptcy courts use a five-part test to determine whether the requirements for an informal proof of claim have been met:

[A] document will qualify as an informal proof of claim in bankruptcy only if it is [1] in writing, [2] contains a demand by the creditor on the bankruptcy estate, [3] expresses an intent to hold the debtor liable for the debt, and [4] the document is filed with the bankruptcy court. . . . If a document meets those four requirements, the bankruptcy court must determine [5] whether, given the particular surrounding facts of the case, it would be equitable to treat the document as a proof of claim.

In re Am. Classic Voyages Co., 405 F.3d 127, 130-31 (3d Cir. 2005)(citations omitted, numbering added).

YPPI's informal proof of claim fails because none of the cases it cites involve facts as extreme as those present here. AdMedia has made no filings in this Court. Opp. at 11. YPPI's original Proof of Claim, filed with the Court on May 30, 2013, does not mention AdMedia, nor do any of YPPI's other filings, with the exception of its October 23, 2015 proposed Amended Proof of Claim. YPPI's reliance on *Agassi v. Planet Hollywood Int'l, Inc.*, 269 B.R. 543 (D. Del. 2001) is misplaced. In that case, the Court drew two conclusions, both cited by YPPI, but neither of which is applicable to the instant facts.

First, the *Agassi* court held that the "the Athletes are not precluded from pursuing their claims on the basis that the Proofs of Claim at issue were filed by the Athlete's service companies and not by the individual Athletes." *Id.* at 549. The relationship between the Athletes and their service companies is not analogous to the relationship between AdMedia and YPPI. In *Agassi*, "the service companies were only placed in between the Athletes and Defendants for the purposes of protecting the Athletes from tax and other liabilities." *Id.* The court had previously ruled that the service companies represented the Athletes for purposes of contract formation. *Id.* It held that the "Celebrity Contracts" were "personal service contracts" - in other words, contracts entered into by

the Athletes, even though the contracts were formally entered into by the Athletes' respective service companies. *Id.* In contrast to *Agassi*, the Court has not previously held that YPPI officially represents AdMedia, thereby allowing YPPI's Proof of Claim to serve as AdMedia's.

Second, each of the Athlete/creditors in *Agassi* had actually filed documents with the court, specifically "Plaintiffs' Objection to the Omnibus Motion Pursuant to Section 365 of the Bankruptcy Code for Authority to Assume or Reject as Applicable, Certain Executory Contracts and Leases, and a Related Request for Relief from the Automatic Stay to Terminate Agreements and Repossess Property" (the "Objection"). *Id.* at 550. The court applied the equitable doctrine of informal proof of claim simply because the Objection did not constitute a formal proof of claim. *Id.* The Objection did, however, meet the requirements of the five-part test. *Id.* The court also applied the informal proof of claim doctrine to allow some of the Athletes – Seles, Woods, MS Basenet Inc., and ETW Corp. – to seek attorney's fees on the basis of a letter their counsel sent to Defendants, but not to the court. *Id.* at 550-551. The letter, along with other filings not made to the Bankruptcy court, sufficed as informal proofs of claim for attorney's fees because they were "coupled with the Plaintiffs' Objection." *Id.* at 551. AdMedia, in contrast, has not filed anything with the Court that could serve as a basis for an informal proof of claim.

CONCLUSION

The Court hereby denies YPPI's Motion to Amend to Join AdMedia Systems, Inc. as Claimant because of findings of undue delay, bad faith, undue prejudice, and futility of amendment. Moreover, the Court holds that YPPI has not met the requirements for an informal proof of claim. The Court will issue an Order.

Dated: April 4, 2016



KEVIN GROSS, U.S.B.J.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
SUPERMEDIA LLC,)	Case No. 13-10546(KG)
)	
Reorganized Debtor.)	
_____)	
SUPERMEDIA LLC,)	
)	
Plaintiff,)	
)	
v.)	Adv. Pro. No. 15-50044(KG)
)	
YELLOW PAGES PHOTOS, INC.,)	
)	
Defendant.)	Re: Dkt. Nos. 127, 166, 173
_____)	

ORDER

On November 4, 2015, Yellow Pages Photos, Inc., filed a Motion to Amend to Join AdMedia Systems, Inc., as Claimant (the "Motion"). The parties fully briefed the Motion and the Court heard argument. For the reasons stated in the accompanying Memorandum Opinion, the Motion is denied.

Dated: April 4, 2016



KEVIN GROSS, U.S.B.J.