UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-10184-RGS

BOSTON SCIENTIFIC CORPORATION

v.

RADIUS INTERNATIONAL, L.P.

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR LEAVE TO FILE AMENDED COUNTERCLAIM

May 2, 2008

STEARNS, D.J.

On January 30, 2006, plaintiff Boston Scientific Corporation (BSC) filed this action against defendant Radius International, L.P. (Radius), seeking declaratory and injunctive relief regrading its licensing of Radius's "Silk Tip" catheter technology. Radius answered the Complaint and asserted a Counterclaim on April 18, 2006, alleging, *inter alia*, that BSC had fraudulently induced it into signing the disputed License Agreement.

On July 18, 2006, the court entered a Scheduling Order setting August 1, 2006, as the deadline to file amended and supplemental pleadings under Fed. R. Civ. P. 15. On July 27, 2006, BSC filed an Amended Complaint adding claims for breach of contract and misappropriation of confidential information and trade secrets.[1] On a joint motion of the parties, the court extended the deadline for the filing of Rule 15 motions to September 12, 2006. On that day, the parties filed another joint motion to extend the Rule 15 deadline,

[1]BSC filed a Second Amended Complaint on September 14, 2006.

which the court granted, setting September 19, 2006, as the termination date. Discovery closed on February 2, 2007.

On April 27, 2007, BSC filed a motion for summary judgment on Radius's counterclaims. In its opposition, Radius identified several new theories of fraudulent inducement that were not pled in the Counterclaim. At the summary judgment hearing on January 18, 2008, the court indicated that it would not consider Radius's previously undisclosed claims. That ruling was formalized in the court's January 24, 2008 Order limiting Radius "to the fraudulent inducement theories specified in Counterclaim I." The case was set for trial on June 2, 2008. Undeterred by the court's ruling or the imminent trial date, on February 19, 2008, Radius filed a motion to amend the Counterclaim. For the following reasons, the motion is DENIED.

DISCUSSION

Amendments to a counterclaim, as is the case with all other pleadings, are governed by Rule 15. A motion to amend is "treated differently depending on its timing and the context in which it is filed." Steir v. Girl Scouts of the USA, 383 F.3d 7, 11-12 (1st Cir. 2004).

The federal rules set out a liberal standard for allowing a party leave to amend its pleadings. See Fed. R. Civ. P. 15(a) ("[L]eave [to amend] shall be freely given when justice so requires"); see also Fed. R. Civ. P. 13(f) (leave to file a counterclaim may be given "if it was omitted through oversight, inadvertence, or excusable neglect or if justice

so requires.").[2] Under this standard, the amendment of pleadings is generally permitted unless the opposing party makes a showing of undue delay, bad faith, undue prejudice, or futility. See Forman v. Davis, 371 U.S. 178, 182 (1962); Resolution Trust Corp. v. Gold, 30 F.3d 251, 253 (1st Cir. 1994).

This permissive standard, however, becomes less so after the court issues a scheduling order setting a deadline for amendments to the pleadings. A party wishing to file an out-of-time amendment must show good cause for delay under Rule 16(b). See Steir, 383 F.3d at 12, citing O'Connell v. Hyatt Hotels of P.R., 357 F.3d 152, 154-155 (1st Cir. 2004). Under the good cause standard, the court assesses the diligence of the party seeking to amend, without considering a lack of bad faith or lack of prejudice to the opposing party. See Steir, 383 F.3d at 12. Stated more precisely, "the court may extend a scheduling order deadline on a showing of good cause if the deadline cannot reasonably be met despite the diligence of the party seeking extension." O'Connell, 357 F.3d at 154 (internal quotation omitted). The longer a party delays, the more likely the motion to

[2]Radius contends that amendments to a counterclaim are governed exclusively by Rule 13(f), which, in its view, establishes an even more generous standard for granting leave to amend than does Rule 15. Although the court recognizes that Rule 13(f)'s separate amendment provision is potentially confusing (and seemingly superfluous), it sees no basis for treating the two Rules as mutually exclusive. The better approach is to construe Rule 13(f) as supplementing the general amendment standard of Rule 15. In other words, once a case has progressed beyond the stage where Rule 15(a) allows an amendment as of right, and the court is satisfied that a party omitted a counterclaim because of "oversight, inadvertence, or excusable neglect" as provided by Rule 13(f), then the court makes a determination whether to grant leave under Rule 15. In this case, the Rule 15 analysis subsumes the Rule 13(f) standard because, as explained below, it is more exacting.

amend will be denied. See Steir, 383 F.3d at 12. See also ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 57 (1st Cir. 2008).

Where the motion to amend is filed after a motion for summary judgment is joined, the moving party has the *additional* burden of showing not only that the proposed amendments have substantial merit, but also of providing "substantial and convincing evidence" in support of the newly asserted claims. Steir, 383 F.3d at 12, citing Gold, 30 F.3d at 253. See also Hatch v. Dep't for Children, Youth, and Their Families, 274 F.3d 12, 19 (1st Cir. 2001) ("[T]he proposed amendment must be not only theoretically viable but also solidly grounded in the record."). Radius has offered no evidence to support the merits of its claim, content instead to rest on the argument that its proposed amendments do not fall within the strictures of Rule 15. That is an erroneous interpretation of the law.

Radius filed the motion to amend on February 19, 2008, exactly seventeen months after the deadline set in the Scheduling Order. The proposed amendments consists of four additional theories of fraudulent inducement supported by over 100 new paragraphs of factual allegations.[3] Radius asserts that the new allegations are based entirely on

[3]Radius suggests that the proposed claims are not new and that they simply further particularize the fraud claim previously pled. See McMillan v. Mass. Soc'y for Prevention of Cruelty to Animals, 168 F.R.D. 94, 97-98 (D. Mass. 1995) (allowing leave to amend a counterclaim one month after summary judgment because the amendments "add[ed] very little, if anything, to [the] underlying claim."). Radius's characterization of the amendments lacks any credibility. Although the additional pleadings are all captioned "fraud," they encapsulate four distinct theories, each supported by a distinct set of facts. For example, approximately twenty new factual allegations underlie the so-called PASV theory (that BSC did not inform David Quinn that it planned to use the Silk Tip only as a platform for its PASV valve). Another twenty-eight paragraphs provide the grounds for the so-called Tunneler Application theory (that Quinn would not have assigned his rights to BSC under the Tunneler Patent Application had he known that the Silk Tip project was "canceled" and not merely "on hold").

evidence that it unearthed during discovery, most of which was not uncovered until September of 2006, and was not confirmed until the deposition of David McClellan on April 3, 2007.[4]

Assuming that Radius's version of events is true, by its own account it knew of the additional claims by September of 2006 at the latest, that is within the (twice extended) deadline set out in the Scheduling Order. Indeed, Radius concedes that it could have "identified two of the new fraud claims" when it drafted its supplemental interrogatory responses in October of 2006. In other words, Radius knew of the factual predicate underlying the proposed claims *at least seventeen months prior to filing this motion.* A diligent party would have at least sought to amend the Scheduling Order at that point, even if the full scope of the new claims was not yet "fully confirmed."[5]

Instead, Radius opted to lie in wait, revealing its new claims only after BSC had disclosed its hand in filing a motion for summary judgment. Even at that juncture, when Radius could have sought leave to amend the Counterclaim, it did not. Instead, it chose to announce the new theories in its summary judgment papers (thereby circumventing Rule 9's heightened pleading standard). Radius offers no justification for its delay other than

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[4]McClellan is BSC's President of Oncology.

[5]Although Radius claims that the facts underlying its proposed amendments were not "confirmed" until the McClellan deposition, most of the documents which Radius cited in its summary judgment papers were produced by BSC in August of 2006. Further, Radius's supplemental interrogatory responses dated October 28, 2006, set forth the facts supporting two of the new fraud theories it now seeks to include in the proposed amendment. Clearly, by late October of 2006, Radius had "ascertained that BSC might have committed additional acts of fraud." Yet it did not move to amend either the Counterclaim or the Scheduling Order.

stating, without explanation, that it would have been impractical and "unduly burdensome" to seek an amendment at that point because of the summary judgment deadline. Even if that were the case, it does little to adequately explain the additional year Radius waited before bringing the instant motion.[6] The delay is fatal. See Steir, 383 F.3d at 12 ("[P]rotracted delay, with its attendant burdens on the opponent and the court, is itself a sufficient reason for the court to withhold permission to amend.").[7]

ORDER

For the foregoing reasons, defendant's motion for leave to file an amended counterclaim is DENIED.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE

[6]Radius attributes this to ignorance, offering the lame explanation that it did not know that it would be required to formally amend its Counterclaim in order to seek recovery on the new theories.

[7]Nor is the court persuaded that Radius is entitled to leave to file because its Counterclaim may be construed as compulsory. In the context of this litigation, where the case is now at the eve of trial, the compulsory nature of the Counterclaim does not relieve Radius of its burden to show good cause for its lack of diligence. See, e.g., McLemore v. Vandry, 898 F.2d 996, 1003 (5th Cir. 1990) (leave to amend compulsory counterclaim denied where motion was filed six months after summary judgment motions were filed).