

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

INFO-HOLD, INC.,	:	Case No. 1:11-cv-283
	:	
Plaintiff,	:	Judge Timothy S. Black
	:	
vs.	:	
	:	
MUZAK HOLDINGS LLC, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**ORDER THAT PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST
AMENDED AND SUPPLEMENTAL COMPLAINT (Doc. 62) IS DENIED**

This civil action is before the Court on Plaintiff's motion to file a first amended and supplemental complaint (Doc. 62) and the parties' responsive memoranda (Docs. 68, 70).

I. BACKGROUND

Plaintiff filed its original complaint in this case on May 3, 2011, more than a year and a half ago. (Doc. 1). Following a scheduling conference, and based on the parties' joint suggestions, the Court issued a Calendar Order, subsequently extended, which included a deadline of November 29, 2011 (almost a full year ago) by which to file motions to amend the pleadings and/or add additional parties. (Doc. 23). Now, almost a year after the deadlines for amendment of pleadings and for service of infringement contentions have passed, and with discovery closing in less than two months, Plaintiff has filed its motion to file a first amended and supplemental complaint.

According to Plaintiff, the purposes of the proposed amended complaint are to accuse a new product, to state sufficient allegations about that product to form the basis for a subsequent motion for preliminary injunction, and to satisfy questions raised by the Defendants regarding allegations contained in the original complaint.

The motion to file the amended complaint is now fully briefed. (Docs. 23, 68, 70).

II. STANDARD OF REVIEW

Under Rule 15(a) of the Federal Rules of Civil Procedure, a plaintiff may amend its pleadings as a matter of course if the amendment is filed within 21 days after service of a 12(b)(6) motion. Fed. R. Civ. P. 15(a)(1)(B). If a plaintiff wishes to file an amended complaint after the 21 day grace period, he is required to seek leave of the court to do so. And Rule 15 provides that “[t]he court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2).

The United States Supreme Court has held that motions for leave to amend should be liberally granted unless the motions are brought in bad faith or the proposed amendments would cause undue delay, be futile, or unfairly prejudice the opposing parties. *Foman v. Davis*, 371 U.S. 178, 182 (1962). “A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss.” *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000).

Separate and apart from the Rule 15 requirements, however, a party moving for leave to amend its pleadings, after the deadline for such amendments set in the case scheduling order has passed, must show “good cause.” Fed. R. Civ. Proc. 16(b)(4). The

“good cause” requirement specifically calls for evidencing good cause for the “failure earlier to seek leave to amend.” *Leary v. Daeschner*, 349 F.3d 888, 909 (6th Cir. 2003).

In the final analysis, granting or denying a request to amend a complaint is left to the broad discretion of the district court. *Gen. Electric Co. v. Sargeant & Lundy*, 916 F.2d 1119, 1130 (6th Cir. 1990).

III. ANALYSIS

A. Fed. R. Civ. Proc. 16(b)(4)

As Defendants have pointed out, nearly a year has passed since the deadlines expired for the amendment of pleadings and the service of infringement contentions, and discovery will close in less than two months. As a result, the inquiry into whether Plaintiff can demonstrate good cause, as required by Rule 16(b)(4), for its failure to move to amend the pleadings earlier, is an important one. However, Plaintiff’s motion does not even address the “good cause” standard of Fed. R. Civ. Proc. 16(b)(4), and Plaintiff makes little attempt to meet it, even in its reply brief. (Doc. 70). Plaintiff makes little attempt to answer: (1) when it first learned of the new allegedly infringing products or the new facts it now seeks to add; (2) why moving almost a year past the deadline for amending the pleadings does not constitute undue delay in this case; and (3) why this amendment will not prejudice the Defendants. Specifically, although the new product that Plaintiff now seeks to challenge was introduced into the market in late March or early April 2012, Plaintiff offers no justification to the Court for Plaintiff having waited until now to move to add the product to its claims.

B. Fed. R. Civ Proc. 15(a)

To be granted leave to amend under Rule 15(a), a plaintiff must demonstrate that its motion is not unduly delayed, will not prejudice the opposing party, and does not propose futile amendments.

Here, as discussed *supra*, Plaintiff has not sufficiently justified the lateness of its motion. Plaintiff's motion and proposed first amended complaint do not rely on new facts obtained through discovery. The facts Plaintiff proposes to add in its amended complaint were known to it when it filed its original complaint. Moreover, Plaintiff has been aware of the product line it seeks to add in its amended complaint since before the deadline to amend the pleadings. (Doc. 68 at 5; Doc. 70 at 1). And, according to Plaintiff, Plaintiff itself informed Defendants of the patent. (Doc. 68-2). In this context, it is difficult to classify this unexplained attempt to amend the pleadings - almost a year late, after the Court's claim construction, and less than two months prior to the close of discovery -, and to add facts that the Plaintiff should have known when it made its Local Patent Rule 103.2 disclosures, as anything other than "undue delay."

As noted, the discovery deadline is fast approaching. The *Markman* phase of the case is complete, and the contours of the action as a whole have been established for many months by Plaintiff's Local Patent Rule 103.2 disclosures and the parties' subsequent narrowing of disputed terms.¹ Moreover, Plaintiff failed to file its motion to

¹ Early in a case, Local Patent Rule 103.2 requires patentees to identify all acts they contend relate to infringement. A patentee should not be permitted to utilize belated amendment of pleadings to introduce facts relating to its infringement theories that the patentee was required to allege in its initial Local Patent Rule 103.2 disclosures (in this case, nearly a year ago).

amend until the day after Defendants' Rule 30(b)(6) deposition of Plaintiff, and, accordingly, the granting of the motion to amend will likely require the retaking of that deposition and may well require new and further claim construction by the Court to address new claims being asserted by Plaintiff. All of this creates the very real likelihood of very substantial delays to the final resolution of this case. Such delay is a significant prejudice to Defendants ... and to the Plaintiff.

Moreover, Plaintiff states its allegations of infringement with regard to the new product "on information and belief." (Doc. 62-1). However, as the Supreme Court has expressly provided, a plaintiff must make "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Conclusory allegations, without more, fail to meet the pleading standards. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Iqbal*, 556 U.S. 662 (2009). Under the circumstances here, Plaintiff's proposed new allegations do not meet the requirements of Fed. R. Civ. Proc. 8, and likely do not rise to the level of plausibility required by *Twombly* and *Iqbal*, especially as to Counts 9 and 10 with respect to the MBOX4. The proposed amendments, as currently drafted, are therefore likely futile.

C. Fed. R. Civ. Proc. 15(d)

Finally, although Plaintiff requests that its motion be granted under Rule 15(d) "to the extent necessary," as Defendants properly point out, Plaintiff does not identify nor discuss what part of its proposed amended pleading it would have the Court regard as supplemental under Rule 15(d).

IV. CONCLUSION

Accordingly, for the reasons stated here, Plaintiff's motion for leave to file a first amended and supplemental complaint (Doc. 62) is hereby **DENIED**.

IT IS SO ORDERED.

Date: November 14, 2012

s/ Timothy S. Black
Timothy S. Black
United States District Judge