STATE OF NORTH CAROLINA DURHAM COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 4094
UNITED THERAPEUTICS CORPORATION, Plaintiff, v. LIQUIDIA TECHNOLOGIES, INC. and ROBERT ROSCIGNO, Defendants.	**ORDER AND OPINION ON PLAINTIFF'S MOTION FOR LIMITED RECONSIDERATION**

1. **THIS MATTER** is before the Court on Plaintiff United Therapeutics Corporation's Motion for Limited Reconsideration of Order on Plaintiff's Motion to Amend, (the "Motion"), (ECF No. 132).

2. Having considered the Motion, the related briefs, and other appropriate matters of record, the Court hereby DENIES the Motion.[1]

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips Jr., Eric M. David, and Kasi W. Robinson; McDermott Will & Emery, LLP by Douglas H. Carsten, Arthur P. Dykhuis, and Katherine Pappas; and Goodwin Proctor, LLP, by William C. Jackson, for Plaintiff United Therapeutics Corporation.

Parker Poe Adams & Bernstein LLP, by Stephen V. Carey and Corri A. Hopkins; and Cooley, LLP, by Sanya Sukduang, Jonathan Davies, Lauren Strosnick, and Adam Pivovar, for Defendant Liquidia Technologies, Inc.

McGuire Woods, LLP, by Mark E. Anderson, David E. Finkelson, Corrine S. Hockman, and Miles O. Indest, for Defendant Dr. Robert Roscigno.

Earp, Judge.

[1] The Court decides the Motion without a hearing as permitted by Rule 7.4 of the North Carolina Business Court Rules.

I. PROCEDURAL AND FACTUAL BACKGROUND

3. The parties in this case are two competing pharmaceutical companies and an executive who worked for both companies at different times in his career.

4. At the core of United Therapeutics Corporation's ("UTC") Complaint and its First Amended Complaint, (ECF Nos. 3, 15), are documents allegedly containing UTC's trade secrets, at least some of which were produced by Liquidia Technologies, Inc. ("Liquidia") to UTC during litigation in Delaware. *See generally United Therapeutics Corp. v. Liquidia Techs., Inc.*, 624 F. Supp. 3d 436 (D. Del. 2022). UTC contends that Roscigno took the documents, which contain its trade secrets, to Liquidia.

5. UTC filed its Complaint in this action on 10 December 2021, (ECF No. 3). It asserted claims for misappropriation of trade secrets (under both state and federal law) and conversion against Liquidia and Roscigno, as well as a claim for violation of the UDTPA against Liquidia alone. Defendant Roscigno subsequently removed the case to federal court on 7 January 2022. (ECF No. 6.)

6. On 10 January 2022, UTC filed its First Amended Complaint dismissing the sole federal cause of action. (ECF No. 15.) On 31 March 2022, the case was remanded back to the Business Court. *See United Therapeutics Corp. v. Liquidia Corp.*, 2022 U.S. Dist. LEXIS 123346, at *9 (M.D.N.C. Mar. 31, 2022).

7. UTC subsequently dismissed its claim for conversion against both Liquidia and Roscigno on 27 May 2022, (ECF No. 31).

8. On 10 April 2023, just over a year after the case was remanded to this Court, UTC filed a Motion for Leave to Amend its Complaint a second time. In its motion, UTC sought to add parties, allegations to existing claims, and new claims, including a claim for declaratory judgment with respect to Roscigno's employment agreements with UTC and its subsidiary, Lung Rx. (ECF No. 80.)

9. This Court granted UTC's motion in part but, among other things, denied UTC's request to add a new claim for declaratory judgment. (Order on Plaintiff's Motion to Amend ["20 July 2023 Order"]), (ECF No. 120.) On 10 August 2023, UTC filed the present Motion, requesting that the Court reconsider its ruling and permit UTC to amend its pleading to add the proposed declaratory judgment claim.

II. LEGAL STANDARD

10. "Rule 54(b) is the source of authority for what litigants typically refer to as motions to reconsider." *Pender Farm Dev., LLC v. NDCO, LLC*, 2020 NCBC LEXIS 110, at *4 (N.C. Super. Ct. Sept. 25, 2020) (internal quotations omitted). The rule provides that an interlocutory ruling "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." N.C.G.S. § 1A-1, Rule 54(b).

11. Absent guidance from North Carolina's appellate courts on the standard to apply when considering a motion to reconsider an interlocutory ruling under Rule 54(b), the Court turns to federal case law addressing similarly worded portions of Federal Rule 54(b). *See Ehmann v. Medflow, Inc.*, 2019 NCBC LEXIS 10, at *9 (N.C. Super. Ct. Feb. 6, 2019) ("Without the benefit of North Carolina appellate precedent,

in considering a motion for reconsideration the Business Court has previously relied on case law addressing Federal Rule of Civil Procedure 54(b).").

12. "Courts will reconsider an interlocutory order in the following situations: (1) there has been an intervening change in controlling law; (2) there is additional evidence that was not previously available; or (3) the prior decision was based on clear error or would work manifest injustice." *Aveka L.L.C. v. Adidas Am., Inc.*, 385 F. Supp. 2d 559, 566 (M.D.N.C. 2005) (citations omitted). "Such problems rarely arise and the motion to reconsider should be equally rare." *W4 Farms*, *Inc. v. Tyson Farms, Inc.*, 2017 NCBC LEXIS 99, at *5 (N.C. Super. Ct. Oct. 19, 2017) (citing *DirecTV, Inc. v. Hart*, 366 F. Supp. 2d 315, 317 (E.D.N.C. 2004)).

13. "A motion for reconsideration under Rule 54(b) is within the trial court's discretion." *Id.* at *5 (citing *Aveka L.L.C.*, 385 F. Supp. 2d at 565); *Ward v. FSC I, LLC*, 2017 NCBC LEXIS 19, at *6 (N.C. Super. Ct. Mar. 7, 2017).

III. LEGAL ANALYSIS

14. Quoting a line from the Court of Appeals' decision in *Stetser v. TAP Pharm. Prods. Inc.,* UTC argues that "Rule 15(a) contemplates liberal amendments to the pleadings, which should always be allowed unless some material prejudice is demonstrated." *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 31 (2004). It contends that the Court erred by not finding that material prejudice would result if the amendment to add a declaratory judgment claim were denied, and that UTC's delay in bringing the motion is not a sufficient basis, standing alone, to deny this

amendment. (Br. Supp. Mot. Ltd. Reconsideration Order Pl.'s Mot. Amend ["Pl.'s Br. Supp. Mot."] 4, ECF No. 133).

15. But *Stetser* does not stand for the proposition that a finding of material prejudice is the only basis upon which to deny a motion to amend. In the very next sentence of the same opinion, the Court of Appeals identified "[s]ome of the reasons for denying a motion to amend [as including] undue delay by the moving party, unfair prejudice to the nonmoving party, bad faith, futility of the amendment, and repeated failure to cure defects by previous amendments." *Id.* Indeed, the *Stetser* court included undue delay among its reasons for denying the motion to amend in that case. This is not surprising, as it has long been the law that,

> a trial court may appropriately deny a motion for leave to amend on the basis of undue delay where a party seeks to amend its pleading after a significant period of time has passed since filing the pleading and where the record or party offers no explanation for the delay.

Rabon v. Hopkins, 208 N.C. App. 351, 354 (2010) (affirming a trial court's denial of a motion to amend when the plaintiff moved to amend nine months after filing the complaint without providing a sufficient explanation for the delay).

16. In this case, the focus of the proposed declaratory judgment claim is on two employment agreements between UTC (or its subsidiary, Lung Rx) and Roscigno dating back to 1997 and 2007, respectively. UTC has long been aware of the existence of these agreements and their potential import to this case. (20 July 2023 Order, ¶ 33.) In fact, UTC referenced the employment agreements several times in its Complaint filed over a year and a half ago. (Complaint ¶¶ 14, 18, 22, 32.) As this Court found, UTC offers no reasonable explanation for its delay in asserting a

declaratory judgment claim. (20 July 2023 Order, ¶ 33.) *See Strickland v. Lawrence*, 176 N.C. App. 656, 667 (2006) (affirming trial court's denial of motion to amend when plaintiffs presented no evidence to support their claim that the amendment was based upon information obtained in discovery).

17. Further, this Court has found that the proposed claim would increase the stakes of the lawsuit for the Defendants. UTC's position is that the employment agreements give it the right to own property developed by Roscigno while working for Liquidia if that property was developed using UTC's trade secrets. At issue is a newly-developed treprostinil treatment for pulmonary arterial hypertension. While UTC has sought damages and equitable relief for alleged misappropriation of trade secrets from the start, it has not, until now, asserted that it has a right to own its competitor's product. As stated in the 20 July 2023 Order, the proposed claim would present new legal issues about the ownership of intellectual property that "heretofore have not be a focus of this case." (20 July 2023 Order ¶ 34.)

18. In *KixSports v. Munn*, the plaintiff asserted claims for, among other things, breach of fiduciary duty, breach of operating agreement, and misappropriation of trade secrets. *KixSports, LLC v. Munn*, 2019 NCBC LEXIS 92, at *1 (N.C. Super. Ct. Jan. 24, 2019). Fifteen months after filing the original complaint, the plaintiff sought to add a new claim for declaratory judgment, alleging that a competing business belonged to the plaintiff because the defendants created the competing business using the plaintiff's resources. *Id.* at *3. This Court held that the new declaratory judgment claim would "greatly change the nature of the defense and greatly increase the stakes

of the lawsuit." *Id.* at *6 (internal citation and quotation marks omitted). In a well-reasoned opinion, the Honorable Adam M. Conrad explained:

> There is a clear and significant difference between [plaintiff's] current claims (which seek damages for breach of duties owed to [plaintiff]) and the new declaratory judgment claim (which alleges that [plaintiff] *owns* [the competing business]). At present, Defendants face the possibility of substantial damages if [plaintiff] prevails. If the amendment were granted, Defendants could lose their business in its entirety[.]

Id.

19. So too, here. UTC's First Amended Complaint prays for a permanent injunction, compensatory damages, punitive damages, attorneys' fees, and the cost of the action. Addition of the proposed declaratory judgment claim puts Roscigno and Liquidia at risk that Roscigno would have to "assign and transfer to United Therapeutics all right, title and interest in and to any patentable or unpatentable inventions, discoveries and ideas [Roscigno] made or conceived while employed by Liquidia[.]" To the extent that it was at all unclear in the 20 July 2023 Order, in addition to other prejudice resulting from undue delay, the Court specifically finds that adding a declaratory judgment claim now, after months of hard-fought litigation, would unfairly prejudice Defendants by, for the first time, putting ownership of inventions, discoveries and ideas Roscigno made or conceived while employed by Liquidia at risk. *Cf. Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 727 (1980) (affirming the denial of a motion to amend to add a claim for unfair and deceptive trade practices where the allegations would not only greatly change the nature of the defense but also would subject defendant to potential treble damages so as to greatly increase the stakes of the lawsuit); *Clean N Dry, Inc. v. Edwards*, 284 N.C. App. 771

(2022) ("We have previously held that UDTP claims greatly increase the stakes of a lawsuit because UDTP allegations would not only greatly change the nature of the defense but also would subject the defendant to potential treble damages." (cleaned up)); *House Healers Restorations v. Ball*, 112 N.C. App. 783, 786-87 (1993) (same).

20. Furthermore, the idea that the passage of time can itself result in unfair prejudice is not a concept foreign to the law, and the Court has determined that the addition of the proposed claim now—late in the twice-extended fact discovery period, after the exchange of thousands of documents and multiple depositions—would unfairly prejudice the defendants. *See House Healers Restorations*, 112 N.C. App. at 787 (affirming a trial court's denial of a motion to amend where extensive discovery had already taken place and the new counterclaims would require evidence of a transaction that occurred three to five years earlier); *Patrick v. Williams*, 102 N.C. App. 355, 360 (1991) (affirming a trial court's denial of a motion to amend where a full year had elapsed since movants filed their answer, both parties had conducted extensive discovery, and the proposed claims would have required evidence of negligence occurring approximately five years after the accident in question).

21. Although UTC argues that the addition of its proposed declaratory judgment claim would not result in the need for more discovery, the Court does not accept that representation at face value. As noted above, addition of the claim would "greatly change the nature of the defense[.]" *See Stetser*, 165 N.C. App. at 32 ("Different evidence would be necessary to support these additional legal claims, which could involve more discovery for the parties, slow the litigation process, and

present a more unwieldy litigation for the trial court to administrate."); *Freese v. Smith*, 110 N.C. App. 28, 33 (1993) (affirming the denial of a motion to amend when "the addition of a new legal theory may well have changed defendant's approach to discovery."). UTC cannot speak to the discovery Liquidia might require with respect to the enforceability and effect of the employment agreements at issue. Moreover, to capitalize on the claim if it were to be successful, UTC would need to delve into the ownership rights of Liquidia's intellectual property, a rabbit hole it has yet to explore. All of this would come at additional cost and, given the parties' track record with respect to discovery disputes,[2] has the very real potential of derailing the Case Management Order in this case yet again.

22. Contrary to Liquidia's position, UTC argues that it is the one that will be prejudiced if the amendment is *not* allowed. UTC alleges, "Defendants should not be able to wield the agreement as a shield, and at the same time, seek to avoid its concomitant obligations by claiming prejudice when UTC seeks a remedy arising from that agreement." (Pl.'s Br. Supp. at 8.) But Roscigno has been clear from the start of this action that the provisions of his agreements with UTC will be a critical part of his defense. (*See* Dr. Roscigno's Answer to Pl.'s First Am. Compl. ["Answer"] Second Defense, ECF No. 61) ("Plaintiff's claims are barred, in whole or in part, by . . . the terms of Dr. Roscigno's agreements with UTC or Lung Rx[.]"). UTC's argument only

[2] The parties have been embattled over discovery issues for months. The Court has held hearings regarding discovery disputes on five occasions, some of them extensive. At the time of this Order, the Court is in receipt of another four Business Court Rule 10.9 disputes and a Motion to Compel requiring its attention.

serves to highlight that it could have, but did not, bring its declaratory judgment claim sooner.

23. The Court has fully considered the matters of record and the arguments of the parties. It has detailed the bases for its decision to deny UTC's Motion to Amend to add a declaratory judgment claim, including the prejudice allowing the amendment would inject in the proceedings. Having done so, the Court concludes that UTC has failed to show that the 20 July 2023 Order, as it relates to UTC's proposed declaratory judgment claim, contains clear error. *See DirecTV, Inc.*, 366 F. Supp. 2d at 317 ("Motions to reconsider are not proper where the motion merely asks the court to rethink what the Court has already thought through—rightly or wrongly." (cleaned up)); *W4 Farms, Inc.*, 2017 NCBC LEXIS 99, at *12 (same). Accordingly, the Court concludes, in the exercise of its discretion, that the Motion should be DENIED.

CONCLUSION

24. **WHEREFORE**, the Court, for the reasons stated herein and in the exercise of its discretion, hereby **DENIES** United Therapeutics Corporation's Motion for Limited Reconsideration of Order on Plaintiff's Motion to Amend.

SO ORDERED, this the 31st day of August, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases