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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 PHILIPS NORTH AMERICA, LLC,
11 et al.,

Plaintiffs,

12 v.

13 SUMMIT IMAGING INC., et al.,

14 Defendants.

CASE NO. C19-1745JLR

ORDER GRANTING MOTION
TO AMEND

15
16 **I. INTRODUCTION**

17 Before the court is Plaintiffs Philips North America, LLC, Koninklijke Philips
18 N.V., and Philips India, Ltd.’s (collectively, “Philips”) motion for leave to amend their
19 complaint. (MTA (Dkt. # 80).) Defendants Summit Imaging Inc. and Lawrence R.
20 Nguyen (collectively, “Summit”) oppose the motion. (Resp. (Dkt. # 90).) The court has
21 reviewed the motion, the parties’ submissions in support of and in opposition to the
22 motion, the relevant portions of the record, and the applicable law. Being fully advised,

1 the court GRANTS Philips's motion to amend. Philips must file its third amended
2 complaint (Proposed TAC (Dkt. # 80-1)) within seven (7) days of this order.

3 **II. BACKGROUND**

4 The court has detailed the factual and procedural background of this matter in
5 several previous orders and thus reviews only the pertinent facts here. (*See, e.g.*, 3/30/20
6 Order (Dkt. # 35); 11/16/20 Order (Dkt. # 73); 11/23/20 Order (Dkt. # 77); 12/16/20
7 Order (Dkt. # 94).) Philips brought suit alleging that Summit hacks into Philips's
8 ultrasound systems to enable features or options for which customers have not paid. (*See*
9 *generally* SAC (Dkt. # 36).) Discovery is ongoing, and both parties have requested and
10 produced information on two specific ultrasound systems, the iE and iU systems, as well
11 as the Boris software platform that those systems utilize. (MTA at 2-3; Resp. at 6; Reply
12 (Dkt. # 96) at 2-4.) On November 6, 2020, the parties unearthed a new dispute over
13 whether the iE and iU systems are included in this suit. (Levy Decl. (Dkt. # 91) ¶¶ 11-12
14 & Exs. I-J.) On November 25, 2020, Philips moved for leave to amend its complaint to
15 add allegations to three of its paragraphs to make clear that the iE and iU ultrasound
16 systems as well as the corresponding Boris software platform are encompassed within the
17 claims. (*See* Proposed TAC ¶¶ 23, 29, 31.)

18 **III. ANALYSIS**

19 The parties are familiar with the law behind amendment because of Summit's
20 previous bid to amend its answer, which Philips "strenuous[ly]" opposed. (11/23/20
21 Order at 3.) Because Philips filed its motion on the deadline to amend pleadings (11/5/20
22 Sched. Order (Dkt. # 71)), Federal Rule of Civil Procedure 15 supplies the rule of

1 decision. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992).
2 Under Rule 15, the court should “freely give” leave to amend a pleading “when justice so
3 requires.” Fed. R. Civ. P. 15(a)(2). Five factors are considered: (1) bad faith, (2) undue
4 delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the
5 party has previously amended its pleading. *Allen v. City of Beverly Hills*, 911 F.2d 367,
6 373 (9th Cir. 1990) (citing *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th
7 Cir. 1989)). The third factor of prejudice is the “touchstone of the inquiry.” *Eminence*
8 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). The burden is on the
9 party opposing amendment to show that amendment is not warranted. *Wizards of the*
10 *Coast, LLC v. Cryptozoic Entm’t, LLC*, 309 F.R.D. 645, 649 (W.D. Wash. 2015).

11 Summit opposes amendment under four of the five factors, arguing that there is
12 substantial prejudice, undue delay, bad faith, and that this is Philips’s third amendment.¹
13 (Resp. at 9.) The court disagrees. Beginning with the “touchstone of the inquiry,” the
14 court does not find sufficient prejudice to weigh against amendment. The record evinces
15 that much of the discovery related to the iE and iU systems has already been produced,
16 and Philips maintains that the amendments will not “expand discovery or document
17 production.” (Reply at 1-3 (“[T]he proposed amendments will not require [Summit] to
18 search for or produce additional documents.”).) Moreover, the parties have almost three
19 months to complete discovery if necessary. (*See* 11/5/20 Sched. Order.) Under these
20 circumstances, the prejudice factor favors amendment. *See Cent. Freight Lines, Inc. v.*

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22 ¹ Summit does not challenge futility (*see* Resp.), and the court finds that Philips’s
proposed amendments are not futile.

1 *Amazon Fulfillment Servs.*, No. C17-0814JLR, 2019 WL 1115257, at *3 (W.D. Wash.
2 Mar. 11, 2019) (finding no prejudice with two months of discovery left).

3 Summit’s objections regarding prejudice boil down to the fact that Philips has not
4 fully produced the Boris source code and thus, Summit’s experts may not have time to
5 inspect the code by the expert disclosure deadline. (Resp. at 11-12.) However, Philips
6 represents that much of the Boris source code is contained within another source code
7 that was produced for expert inspection in May 2020, and that the outstanding Boris
8 source code “will be available for inspection shortly.” (Reply at 4.) The court agrees that
9 Summit has “no way of knowing” the degree of overlap between what has and has not
10 been produced (*see* Resp. at 12), but given Philips’s assurances—about both the lack of
11 need for additional discovery and the details regarding the outstanding Boris source
12 code—Summit would not be prejudiced such that the court should contravene the policy
13 of liberally granting leave to amend.

14 The court also finds no undue delay or bad faith. Undue delay looks at (1) the
15 length of the delay from when the moving party obtained relevant facts; (2) whether
16 discovery has closed; and (3) proximity to trial. *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794,
17 798-99 (9th Cir. 1991). Philips was not aware of the dispute over the iE and iU systems
18 until early November and filed this motion less than a month afterwards. (Levy Decl.
19 ¶¶ 11-12 & Exs. I-J; MTA.) Discovery remains open, and trial is seven months away.
20 (11/5/20 Sched. Order.) Summit insists that Philips should have known about the dispute
21 “almost three months” ago (Resp. at 11), but even if that were true, three months does not
22 constitute undue delay, especially when discovery has not yet closed, *see Intellicheck*

1 *Mobilisa, Inc. v. Honeywell Int'l Inc.*, No. C16-0341JLR, 2017 WL 3772708, at *2 (W.D.
2 Wash. Aug. 30, 2017). Furthermore, Summit presents no evidence that Philips “act[ed]
3 with intent to deceive, harass, mislead, delay, or disrupt.” *See Wizards of the Coast*, 309
4 F.R.D. at 651. Thus, there is no bad faith on Philips’s part that would counsel denial of
5 leave to amend.

6 Summit is correct that Philips has previously amended its complaint. (*See Resp. at*
7 9.) A district court’s discretion to deny amendment is “particularly broad” when a
8 plaintiff has already had one or more opportunities to amend. *Ascon Props.*, 866 F.2d at
9 1160. But previous amendments are not dispositive. *See Wizards of the Coast*, 309
10 F.R.D. at 654. Here, Philips has amended its complaint once with Summit’s consent and
11 again at the direction of the court. (Stip. (Dkt. # 22); Am. Compl. (Dkt. # 23); 3/30/20
12 Order at 21; SAC (Dkt. # 36).) The court finds that the previous amendments here do not
13 outweigh the other factors that favor amendment. Because the court should freely grant
14 leave to amend under Rule 15(a)(2), and Summit establishes neither prejudice nor a
15 strong showing of any other factor, the court grants Philips’s motion for leave to amend.

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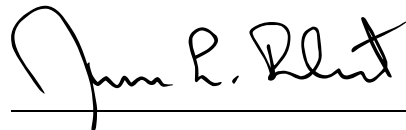
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IV. CONCLUSION

For the foregoing reasons, the court GRANTS Philips's motion for leave to file a third amended complaint (Dkt. # 80) and authorizes Philips to file a third amended complaint in the form attached as Exhibit 1 to the motion (Dkt. # 80-1) within seven (7) days of the entry of this order.

Dated this 23rd day of December, 2020.



JAMES L. ROBERT
United States District Judge