

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DONALD E. MORISKY,

Plaintiff,

v.

MMAS RESEARCH LLC, et al.,

Defendant.

CASE NO. 2:21-CV-1301-RSM-DWC

ORDER RE DEFENDANT’S MOTION  
TO AMEND ANSWER,  
AFFIRIMATIVE DEFENSES, AND  
COUNTERCLAIMS

The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States Magistrate Judge David W. Christel pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR1, MJR3 and MJR4. Before the Court is Defendant’s Motion to Amend Amended Answer, Amended Affirmative Defenses, and Amended Counterclaims. Dkt. 68.

BACKGROUND

Since the parties are familiar with the facts of this of this case the Court will not restate them here.

1 The operative Second Amended Complaint was filed by Plaintiff on November 19, 2021.  
2 Dkt. 22, 37.

3 On May 23, 2022, Defendants filed their Answer to Plaintiff's Second Amended  
4 Complaint, along with Counterclaims for (1) a Declaratory Judgment that Plaintiff's copyrights  
5 are invalid; (2) a Declaratory Judgment that Defendants are the proper owner of the Morisky  
6 Widget copyright; (3) a Declaratory Judgment that Defendants are entitled to two years of  
7 uninterrupted and unopposed performance of the settlement agreement between the parties; (4)  
8 Breach of Contract for interfering with Defendants' ability to execute his rights and  
9 responsibilities under the settlement agreement; (5) Tortious Interference with the Business  
10 Expectancies Plaintiff consented to as memorialized in Exhibit 3 of the settlement agreement; (6)  
11 Tortious and Malicious Abuse of Process by initiating litigation for the illegitimate purpose of  
12 placing doubt on the ability of Defendants to extend valid licenses to the Morisky Widget; and,  
13 (7) Copyright Infringement by republishing translations of the Copyrighted Morisky Widget  
14 translations using the legend, "© 2006 Donald E. Morisky." Dkt. 52. Plaintiff did not reply.

15 After a series of motions to dismiss this case (Dkt. 20, 29, 47, 49), and following a  
16 change in defense counsel (Dkt. 62), on June 12, 2022 Defendants filed an Amended Answer to  
17 Plaintiff's Second Amended Complaint, Amended Affirmative Defenses, and Amended  
18 Counterclaims (Dkt. 64). In addition to adding facts to bolster the above counterclaims, the  
19 Amended Answer added two additional Counterclaims: (1) Unfair Business Practices Under  
20 RCW 19.86.020 alleging Plaintiff copied the Morisky Widget software, named it the "MMAS  
21 Research Widget Code" and created relationships with businesses that were to be serviced and  
22 licensed through the Morisky Widget pursuant to the terms of the settlement agreement and told  
23 the businesses Defendants were not authorized to sell licenses to the Morisky Widget; and, (2)  
24

1 Breach of the Implied Covenant of Good Faith and Fair Dealing by affirmatively interfering with  
2 Defendants' ability to seek a settlement of the outstanding claims listed in Exhibit 3 to the  
3 settlement agreement, and by copying, without authorization, the software contained in the  
4 Morisky Widget and creating a copycat widget to compete with it. Dkt. 64 at 32-34. Again,  
5 Plaintiff did not reply.

6 On July 28, 2022, Defendant filed the instant Motion to file a Second Amended Answer  
7 to Defendant's Second Amended Complaint, Amended Affirmative Defenses, and Amended  
8 Counterclaims. Dkt. 68. Defendants seek to add Plaintiff's attorney, F. Christopher Austin  
9 (Attorney Austin) "as an additional Counterclaim Defendant", and to add new facts allegedly  
10 arising out of events that happened after the date of their "Amended Counterclaim" related to the  
11 Counterclaims of Tortious Interference with Business Expectancy, Tortious and Malicious  
12 Abuse of Process, and Unfair Business Practices. Dkt. 68 at 5; Dkt. 68-1 at 33-37.

13 On August 15, 2022 Plaintiff responded in opposition to Defendants' motion to amend  
14 (Dkt. 79) and on August 19, 2022 Plaintiff filed a reply. Dkt. 82.

#### 15 STANDARD

16 Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure:

17 ... a party may amend its pleading only with the opposing party's written consent  
18 or the court's leave. The court should freely give leave when justice so requires.

19 "Rule 15(a) is very liberal and leave to amend 'shall be freely given when justice so  
20 requires.'" *AmerisourceBergen Corp. v. Dialysis West, Inc.*, 445 F.3d 1132, 1136 (9th Cir.  
21 2006). "In determining whether leave to amend is appropriate, the district court considers 'the  
22 presence of any of four factors: bad faith, undue delay, prejudice to the opposing party, and/or  
23 futility.'" *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)  
24 (quoting *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999)).

DISCUSSION

Pursuant to Rule 15, Defendants seek to add Plaintiff’s attorney, F. Christopher Austin (Attorney Austin) “as an additional Counterclaim Defendant”, and to include new facts arising out of events that allegedly occurred after their operative pleading was filed. Dkt. 68 at 5; Dkt. 68-1 at 33-37.

Plaintiff objects to the proposed amendment in its entirety, arguing the motion is made in bad faith and is futile. Dkt. 79 at 2. According to Plaintiff, after this Court denied Plaintiff’s motion for a preliminary injunction in April 2022, Defendants “commenced a wide-ranging campaign to contact numerous colleagues and licensees of [Plaintiff’s] Copyrighted Scales to misrepresent and misuse the Court’s denial of Plaintiff’s preliminary injunction as a dispositive finding in favor of MMAS.” Dkt. 79 at 4. In response, Plaintiff claims he instructed his counsel to prepare a letter regarding “the status of the instant case and Plaintiff’s claims as set forth in the public pleadings and filings herein.” Dkt 79 at 5.

Plaintiff insists Defendants’ proposed amendments would be futile because this Court does not have personal jurisdiction over Attorney Austin, and even if it did, Attorney Austin is shielded from personal liability for statements he makes in furtherance of his client’s interest, and “Defendants’ claims arising out of the April [2022] Letter are also barred by absolute litigation privilege, response privilege, and the *Noerr-Pennington* doctrine.” Dkt. 79 at 6.

I. This Court does not have personal jurisdiction over Attorney Austin.

Turning first to the question of whether this Court may exercise personal jurisdiction over Attorney Austin, Defendants did not address personal jurisdiction in their motion (Dkt. 68), but in their reply Defendants assert that this Court has general jurisdiction over Attorney Austin (Dkt. 82 at 4) because he has been admitted *pro hac vice* in this case and a previous case in the

1 state, which means he has “agreed to be bound by the disciplinary rules for Washington courts  
2 and submitted to the governing ethical bar in Washington”. Dkt. 82 at 4.

3 According to Defendants, the interests of judicial economy and convenience favor  
4 permitting them to add Attorney Austin as a party to this case rather than file a separate action  
5 against him because Attorney Austin was directly involved in committing the acts alleged in  
6 their Counterclaims. Dkt. 68 at 5-6; Dkt. 68-1 at 33-37. Defendants contend that Plaintiff will not  
7 be prejudiced by this amendment because discovery has yet to begin. *Id.* at 5.

8 “Federal courts apply state law to determine the bounds of their jurisdiction over a party.”  
9 *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1020 (9th Cir. 2017) (*citing* Fed. R. Civ. P.  
10 4(k)(1)(A)). Washington’s long-arm statute—RCW 4.28.185—“extends jurisdiction to the limit  
11 of federal due process.” *Shute v. Carnival Cruise Lines*, 783 P.2d 78, 82 (Wash. 1989). The due  
12 process clause grants the court jurisdiction over defendants who have “certain minimum contacts  
13 ... such that maintenance of the suit does not offend ‘traditional notions of fair play and  
14 substantial justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

15 A plaintiff asserting general jurisdiction must meet an “exacting standard.” *Arnold*  
16 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 804 (9th Cir. 2004). A defendant is  
17 not subject to general jurisdiction unless its contacts are so “substantial or continuous and  
18 systematic” that they “approximate physical presence” in the forum state. *Bancroft & Masters,*  
19 *Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (no general jurisdiction despite  
20 continuous business relationship with two television networks and a handful of California  
21 vendors). The Ninth Circuit “regularly [has] declined to find general jurisdiction even where [a  
22 party’s] contacts were quite extensive.” *Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc.*, 1 F.3d  
23 848, 851 n. 3 (9th Cir. 1993).

1 General jurisdiction requires a much more substantial connection to the forum than does  
2 specific jurisdiction. *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). A court must  
3 consider “all of the defendant’s activities that impact the state, including whether the defendant  
4 makes sales, solicits or engages in business, serves the state’s markets, designates an agent for  
5 service of process, holds a license, has employees, or is incorporated there.” *Hirsch v. Blue*  
6 *Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1478 (9th Cir.1986). A mere showing that a  
7 defendant has systematic business contacts with the forum, however, is insufficient. *Bancroft &*  
8 *Masters*, 223 F.3d at 1086. A plaintiff must show that the defendant’s activities transcend doing  
9 business “with” the forum state such that it is fair to say that defendant is actually doing business  
10 “in” the forum state. *Id.*; see also *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S.  
11 408, 418 (1984) (“[M]ere purchases, even if occurring at regular intervals, are not enough” to  
12 support general jurisdiction.). It is not enough to show that defendant has “stepped through the  
13 door” of the forum by engaging in ongoing business contacts; plaintiff must show that defendant  
14 “sat down and made itself at home.” *Weyerhaeuser Co., Inc. v. Keating Fibre Intern., Inc.*, 416  
15 F. Supp. 2d 1041, 1045 (W.D. Wash. 2006)(citing *Glencore Grain Rotterdam B.V. v. Shivnath*  
16 *Rai Harnarain Co.*, 284 F.3d 1114, 1125 (9th Cir. 2002)).

17 Here, Plaintiff avers that Attorney Austin lives in Las Vegas, Nevada, is not licensed to  
18 practice law in Washington, and that his law firm—Weide & Miller, Ltd.—is a Nevada Limited  
19 Liability Company with its sole office located in Las Vegas. Dkt. 76 at 1. Attorney Austin also  
20 states that his only connection with the state of Washington is representing Plaintiff in this case  
21 on a *pro hac vice* admission, and only because Defendants are located here. Dkt. 79 at 6-7.  
22 Finally, according to Attorney Austin none of his challenged conduct (in his representative  
23  
24

1 capacity or otherwise) has anything to do with the state of Washington or any resident other than  
2 Defendants. *Id.*

3 Applying the foregoing principles, this Court concludes that Attorney Austin lacks the  
4 substantial, continuous and systematic contacts with the State of Washington that are a  
5 prerequisite to this Court’s exercise of jurisdiction over him. Defendants’ sole argument in favor  
6 of jurisdiction—that Attorney Austin’s *pro hac vice* admission is sufficient to rise to the level of  
7 continuous and systematic contacts with a forum state—is not supported by any case law, nor has  
8 this Court located any law so holding.

9 Since this Court lacks personal jurisdiction over Attorney Austin, Defendants’ motion to  
10 add him as a party to this case is denied. Accordingly, this Court need not address Plaintiff’s bad  
11 faith argument.

12 II. Defendants are entitled to add their proposed factual amendments.

13 Defendants seek to “add new facts arising out of events that happened after the date of  
14 the Amended Counterclaim”. Dkt. 68 at 5. Specifically, Defendants propose the following  
15 additions to the “background” section preceding their enumerated Counterclaims:

16 47. On or about July 2022, MMAS Research was finalizing a settlement with  
17 pharmaceutical company Mitsubishi Tanabe Pharma Corporation.

18 48. On July 8, 2022, a representative of Mitsubishi Tanabe Pharma Corporation  
19 sent an email to MMAS Research, which stated the following:

19 Dear Steven,

20 Thank you for your email.

21 We did receive a communication from Philip Morisky. Based on that  
22 communication there appears to be a legal dispute between you/MMAS Research  
23 LLC and the Morisky family in the United States. Because that communication  
24 references United States legal matters, all communications regarding this matter  
should be with our U.S. legal counsel. We request that you contact our U.S. legal

1 counsel, Frank West of Oblon, McClelland, Maier and Neustadt LLP. His email  
2 address is fwest@oblon.com. This same response was provided to Mr. Morisky.

3 Best regards,

4 Junko Iyoda

5 49. Upon information and belief, the communication from Philip Morisky  
6 referenced in the aforementioned email included disparaging statements about  
7 Trubow/MMAS Research and their inability to effectuate a settlement with  
8 Mitsubishi Tanabe Pharma Corporation.

9 50. On July 27, 2022, MMAS Research sent an email to Mitsubishi Tanabe  
10 Pharma Corporation, cc'ing Morisky, which stated the following:

11 Dear Ms. Junko,

12 Thank you for your response.

13 Please see the report below from Judge Christel which should clarify ownership  
14 of the Morisky Widget copyright and the Mitsubishi Tanabe Morisky Widget. On  
15 April 15, 2022, United States Magistrate Judge David W. Christel of the United  
16 States District Court, Western District of Washington at Tacoma, issued a Report  
17 and Recommendation in case no. 2:21-CV-1301-RSM-DWC (“Report and  
18 Recommendation”), a dispute between Plaintiff and Donald Morisky, which  
19 acknowledged that “MMAS Research LLC holds the Copyright Registration to  
20 the Morisky Widget...” Report and Recommendation at page 6, line 22. Further,  
21 the Magistrate Judge acknowledged that “the Morisky Widget is exclusively in  
22 [MMAS Research LLC’s] control...” Report and Recommendation at page 8, line  
23 16. A true and accurate copy of the aforementioned “Report and  
24 Recommendation” is attached hereto as Exhibit A.

MMAS Research LLC is suing Donald Morisky, Phillip Morisky, and Christopher  
Austin in the U.S. Federal District Court in New Jersey, Washington State, and  
California for tortious interference and willful copyright infringement.

Our attorney Mr. Thad Scroggins will contact Mr. West at his earliest  
convenience.

51. On July 27, 2022, Morisky sent an email to Mitsubishi Tanabe Pharma  
Corporation, cc'ing Trubow/MMAS Research, which stated the following:

Dear All,

Mr. Trubow is falsely misinterpreting Judge Christel’s statement on ownership of  
the Morisky widget which is still very much in active litigation at this time. The



1 judge's statement was a response to a preliminary injunction that the Morisky  
2 Widget issue is still very much a part of a lawsuit to be heard June 2023 in the  
3 State of Washington Federal Court by jury trial. Mr. Trubow knows this and yet  
4 he is actively misinforming you and other clients that a final verdict has been  
5 rendered. Mr. Trubow—who did not have any part in the creation of the Morisky  
6 Medication Adherence Scales (MMAS) 4 & 8—signed an agreement on  
7 December 2020 which required him to turn over all MMAS IP and derivatives  
8 (including the Morisky widget and licensees such as the MITSUBISHI TANABE  
9 Morisky widget) to me, owner/ developer of the copyrighted MMAS scales. Mr.  
10 Trubow brazenly violated that agreement and this is why we are in federal lawsuit  
11 against him.

12 The Morisky Widget—the real registered name with the US Copyright Office is  
13 “MMAS Widget Code”—is nothing more than a software which assigns computer  
14 codes to the scoring algorithms that I—not Mr Trubow or his programmer—  
15 developed for the MMAS 4 & 8 scales. Just because I allowed the widget to host  
16 my scales does not mean I bequeathed my copyrighted IP, my life's work—to  
17 Trubow forever. When I revoked Mr. Trubow's license to use my copyrighted  
18 scales in 2020, I also revoked his use of my MMAS scales in the widget software.  
19 He is misinforming Morisky widgets clients that he is the sole owner of the  
20 MMAS scales which bear my name and which I spent 2 decades developing in the  
21 course of my academic career. I have been licensing them to clients even before  
22 Mr. Trubow came into the picture in 2014 as a business partner. The validated  
23 MMAS scales are one of most widely cited in high tiered journals since 2007.  
24 Note that the scales are named after me, not Trubow. Mr. Trubow can have his  
widget software WITHOUT my copyrighted life's work, i.e., the MMAS 4 and 8  
item questionnaire and scoring algorithms AND without my name Morisky  
attached to the Widget software.

Mr. Trubow is infringing on my name Morisky and the term “MMAS” when he  
refers to the Widget as Morisky widget rather than the registered “MMAS widget  
code”. This was allowed during our short partnership but not anymore when I  
revoked his license.

This too is part of the lawsuit against Mr. Trubow, as is his clinically unvalidated  
Global Medication Reconciliation Form (GMRF) in which he misrepresented in  
our December 2020 agreement as his own IP only to be found out later that he is  
using my MMAS scales, unauthorized, as the central component of his  
polypharmacy reconciliation form.

I have copied my counsel Chris Austin to clarify Mr. Trubow's misinformation re  
Judge Christel's statement. We are also informing Morisky widget clients and  
licensees not to use the Morisky widget as they will be subject to infringement  
claims by the Morisky family, the only rightful owners/sole licensor of the  
MMAS 4 and 8 scales and its derivatives. We are transitioning Morisky widget  
clients to our own software.

1 If you wish to use MMAS-4 or -8 scales please contact me directly.

2 Thank you very much for your understanding and cooperation. Please let me or  
3 my counsel Chris Austin know if you or your legal counsels have questions.

4 Dkt. 68-1 at 26-29.

5 Plaintiff objects to these amendments on the basis of futility<sup>1</sup>. Dkt. 79 at 6. According to  
6 Plaintiff, the communications Defendants seek to add were all made in connection with or in the  
7 course of this legal proceeding and are therefore protected under the “absolute litigation  
8 privilege, the response privilege, and the *Noerr-Pennington* doctrine.” Dkt. 79 at 6. In so  
9 arguing, Plaintiff places an unwarranted emphasis on the April 2022 letter drafted by Attorney  
10 Austin, already contained in the operative pleading<sup>2</sup> (to which they did not respond<sup>3</sup>) and fail to  
11 explain why the proposed amendments are futile. Dkt. 79 at 8-9.

12 For instance, Plaintiff argues the common law conditional reply privilege shields him  
13 from liability for “the April Letter and all communications allegedly made by Plaintiff through  
14 his counsel [because they were made] in response to false allegations regarding this case and its  
15 proceedings” entitling Plaintiff to “set the record straight”. Dkt. 79 at 9. Regarding the April  
16 2022 letter, Plaintiff explains:

17 On April 15, 2022, this Court denied Plaintiff’s motion for a preliminary injunction.  
18 Immediately thereafter, Trubow commenced a wide-ranging campaign to contact  
19 numerous colleagues and licensees of Dr. Morisky’s Copyrighted Scales to

---

20 <sup>1</sup> A motion for leave to amend may be denied on futility grounds if the court concludes the pleading, as  
21 amended, would not withstand a motion to dismiss. *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988);  
*see also* Fed. R. Civ. P. 15(a).

22 <sup>2</sup> Defendants’ proposed amendments do not encompass the April 2022 letter, which was already  
23 incorporated by reference and contained as an exhibit in Defendants’ operative “Amended Answer to Plaintiff’s  
24 Second Amended Complaint, Amended Affirmative Defenses, and Amended Counterclaims”. *See* Dkt. 64 at 25-26.

<sup>3</sup> *See* Fed. R. Civ. P. 12 (1)(B) (“A party must serve an answer to a counterclaim or crossclaim within 21  
days after being served with the pleading that states the counterclaim or crossclaim.”).

1 misrepresent and misuse the Court’s denial of Plaintiff’s preliminary injunction as  
2 a dispositive finding in favor of MMAS.

3 In response to these false claims and to preserve his relationships, Plaintiff directed  
4 the undersigned counsel to prepare a general response to “Dr. Morisky’s  
5 Colleagues.” That response is the April 21, 2022 (“April Letter”), letter attached as  
6 Exhibit N to Defendants’ proposed Second Amended Counterclaim. As noted in  
7 the first paragraph, counsel prepared this letter with the understanding that it would  
8 be provided in response to “email communications [first received] from Steven  
9 Trubow” regarding this action. The letter then sets forth the status of the instant  
10 case and Plaintiff’s claims as set forth in the public pleadings and filings herein.

11 Dkt. 79 at 4-5 (footnotes omitted).

12 However, Defendants insist that this order of events is inaccurate, as evidenced by  
13 Plaintiff’s failure to cite any communications by Trubow between April 15, 2022 and April 21,  
14 2022 wherein he allegedly “misrepresents and misuses the Court’s denial of Plaintiff’s motion for  
15 preliminary injunction as a dispositive finding in favor of MMAS.” Dkt. 82 at 2-3. Instead,  
16 according to Defendants, Trubow did not communicate about the Court’s denial of Plaintiff’s  
17 motion for a preliminary injunction until *after* Plaintiff posted the April 2022 letter on Morisky’s  
18 website. *Id.*

19 After careful review of the relevant evidence the Court finds Defendants’ interpretation  
20 of the timeline appears to be correct. Because the conditional reply privilege only protects  
21 “[a]llegedly libelous statements, spoken or written by a party or counsel in the course of a  
22 judicial [or extrajudicial] proceeding ... if they are pertinent or material to the redress or relief  
23 sought[,]” and as it appears Plaintiff’s April 2022 letter was not written to redress allegedly  
24 libelous statements made by Defendants regarding the Court’s denial of Plaintiff’s preliminary  
injunction, the Court concurs with Defendants that the conditional reply privilege does not apply  
in this context. *McNeal v. Allen*, 95 Wash.2d 265, 267 (1980); *Demopolis v. Peoples Nat’l Bank*,  
59 Wn. App. 105, 109 (Wash. Ct. App. 1990).

1 Next, Plaintiff argues that posting the April 2022 letter on his website is protected by the  
2 *Noerr-Pennigton* doctrine, which shields conduct “incidental to a lawsuit, including a pre-suit  
3 demand letter,” (so long as it does not fall into the realm of “sham litigation”) from liability. Dkt.  
4 79 at 11 (citing *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 930 (9th Cir. 2006) and *Theme*  
5 *Promotions, Inc. v. News America Marketing FSI*, 546 F.3d 991, 1007 (9th Cir. 2008)).  
6 Defendants urge this Court to conclude that it is too early to tell whether Plaintiff’s  
7 communications are protected by any privilege “since Plaintiff’s questionable communications  
8 appear to be ongoing.” Dkt. 82 at 5.

9 The Court concurs with Plaintiff, for purposes of this motion, that his April 2022 letter—  
10 posted on the Morisky website and sent to some customers to inform them he had sued  
11 Defendants for copyright infringement and to advise them regarding continued use of the  
12 copyrighted material at issue—falls under the *Noerr-Pennington* doctrine and is therefore  
13 protected under the First Amendment right to petition. *See e.g., Sliding Door Co. v. KLS Doors,*  
14 *LLC*, Case No. EDCV 13–00196 JGB (DTBx), 2013 WL 2090298, at \*6 (C.D. Cal. May 01,  
15 2013)(*Noerr-Pennington* doctrine barred defendants’ claim for false advertising because the  
16 communication at issue—an email sent to consumers informing them that plaintiff had sued  
17 defendant for patent infringement—was sufficiently related to the reasonably pleaded  
18 complaint). However, this Court does not concur that Defendants’ motion to amend is rendered  
19 futile as a result, because Defendants’ motion does not seek to add the April 2022 letter. *See* Dkt.  
20 79 at 11.

1 Next, Plaintiff claims “communications [with former, current or prospective licensees of  
 2 the Widget] cannot form the basis of a claim for tortious interference with business expectancy”<sup>4</sup>  
 3 because, “it is impossible *as a matter of law* for Dr. Morisky to interfere with his own existing or  
 4 prospective contractual relations.” Dkt. 79 at 11-12 (emphasis added). This is not a full-throated  
 5 futility challenge to amending an unsalvageable claim, but a motion for summary judgment  
 6 untethered to supporting case law. Here, the only communication by Plaintiff that Defendants  
 7 seek to add to their amended pleading is the July 27, 2022 email to Mitsubishi Tanabe Pharma  
 8 Corporation. *See* Dkt. 68-1 at 28-29. This email is not the “basis” for Defendants’ extant tortious  
 9 interference counterclaim, even if Defendants believe this communication further buttresses that  
 10 counterclaim.

11 Finally, Plaintiff’s argument that Washington’s litigation privilege<sup>5</sup> “bars *any claim*  
 12 against the Dr. Morisky [sic] and his counsel for preparing, emailing or posting the April [2022]  
 13 Letter, or *for any other communication made or action taken in connection with this lawsuit* and  
 14 in response to the false claims of Defendants.” Dkt. 79 at 8 (emphasis added). This is far too  
 15 broad an assertion made in far too conclusory a manner for the Court to take up in the context of  
 16 ruling on a motion to amend a pleading.

---

17  
 18  
 19 <sup>4</sup> Under Washington law, the elements of tortious interference with a contract or business expectancy are:  
 20 “(1) the existence of a valid contractual relationship or business expectancy; (2) that defendant[ ] had knowledge of  
 21 that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or  
 22 expectancy; (4) that defendant[ ] interfered for an improper purpose or used improper means; and (5) resultant  
 23 damage.” *Pac. Nw. Shooting Park Ass’n v. City of Sequim*, 158 Wash.2d 342 (2006).

22 <sup>5</sup> “Under Washington’s litigation privilege, immunity from civil liability is afforded to witnesses, attorneys,  
 23 and parties in a lawsuit for statements made in the course of or in connection with judicial proceeding.” Dkt. 79 at 8  
 24 (*citing Deatherage v. Examining Bd. of Psychol.*, 134 Wash.2d 131, 135 (1997) (discussing litigation privilege for  
 expert witnesses) (quoting Restatement (Second) of Torts § 588 (1977) and *Kearney v. Kearney*, 95 Wn. App. 405,  
 415 (Wash. Ct. App. 1999) (“Attorneys likewise enjoy immunity from civil liability during judicial proceedings to  
 ensure that they have freedom to secure justice for clients”)).

1 In sum, Plaintiff has failed to persuade the Court that Defendants’ proposed factual  
2 amendments are futile. To the contrary, the Court finds that Defendants must be freely given  
3 leave to amend their pleading to set forth the factual events that have occurred after the date of  
4 the operative pleading<sup>6</sup>, as enumerated above.

5 CONCLUSION<sup>7</sup>

6 Defendant’s Motion to Amend Amended Answer, Amended Affirmative Defenses, and  
7 Amended Counterclaims (Dkt. 68) is granted in part, and denied in part, for the reasons and in  
8 the particulars set forth herein.

9 Within two weeks of the date of this order Defendants are instructed to submit for the  
10 Court’s review a clean final version, as well as a redlined version that shows the changes made to  
11 Defendants’ “Second Amended Answer to Defendant’s Second Amended Complaint, Amended  
12 Affirmative Defenses, and Amended Counterclaims” in compliance with this Order. After the  
13 Court has an opportunity to review these documents the Court will direct counsel to docket a  
14 final version of the amended pleading.

15 Dated this 14th day of September, 2022.

16 

17 \_\_\_\_\_  
18 David W. Christel  
19 United States Magistrate Judge

20 \_\_\_\_\_  
21 <sup>6</sup> “On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental  
22 pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be  
supplemented.” Rule 15(d). However, Rule 15(d) supplementation does not allow the introduction of “separate,  
distinct and new causes of action.” *Planned Parenthood of S. Arizona v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997)  
(internal quotation omitted).

23 <sup>7</sup> It is within a magistrate judge’s authority to grant leave to amend the complaint. *Vandehey v. Real Soc.*  
24 *Dynamics, Inc.*, Case No. 2:17-cv-02230-JAD-NJK, 2017 WL 4411042, at \*1 n.4 (D. Nev. Oct. 4, 2017) (citing *U.S.*  
*Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1102 n.1 (9th Cir. 1985) and *Morgal v. Maricopa*  
*Cnty. Bd. of Sup’rs.*, 284 F.R.D. 452, 458 (D. Ariz. 2012)).