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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

VISION TECHNOLOGY DESIGN & MANUFACTURING, INC.,)	No. CV-F-07-412 OWW/GSA
)	
)	MEMORANDUM DECISION AND
)	ORDER DENYING DEFENDANT'S
Plaintiff,)	SECOND MOTION TO DISMISS OR
)	TRANSFER (Doc. 30) AND
vs.)	GRANTING PLAINTIFF'S
)	COUNTERMOTION TO FILE SECOND
)	AMENDED COMPLAINT (Doc. 33)
)	
GENERAL WIRE SPRING COMPANY,)	
)	
)	
Defendant.)	
)	
)	

By Memorandum Decision filed on July 17, 2007, Defendant General Wire Spring Company's (General Wire) motion for dismissal or transfer for improper venue pursuant to Rule 12(b)(3), Federal Rules of Civil Procedure, was denied. General Wire's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) was denied in part and granted in part with leave to amend. (Doc. 13). Thereafter, Plaintiff Vision Technology Design & Manufacturing, Inc. (Vision Tech) filed a First Amended Complaint (FAC).

1 The FAC alleges that Vision Tech, a California corporation,
2 has been in the business of manufacturing sewer line cameras,
3 sewer line leak detectors and other similar products; that, prior
4 to 2002, Vision Tech sold its products to distributors and to
5 ultimate consumers; and that General Wire, a Pennsylvania
6 corporation, is a distributor and seller of sewer line
7 maintenance and inspection products, including sewer line
8 cleaners, cameras and leak detectors, which it sells to
9 individuals and businesses in the plumbing industry. The FAC
10 alleges:

11 8. In 2002, Vision Tech and General Wire
12 entered into a business relationship wherein
13 General Wire agreed that it would exclusively
14 purchase from Vision Tech all of General
15 Wire's requirements for certain sewer line
16 inspection and maintenance products. That
17 business relationship continued until mid-
18 2006.

19 9. Before General Wire began to use Vision
20 Tech as its exclusive manufacturer, General
21 Wire used another manufacturer. When General
22 Wire chose to use Vision Tech as its
23 manufacturer, General Wire requested that
24 Vision Tech change the appearance of Vision
25 Tech's pre-existing products to mimic the
26 appearance of General Wire's products.
General Wire asserted that the purpose for
this request was to facilitate the transition
between the prior manufacturer and Vision
Tech and to ensure that repair parts would be
compatible. Vision Tech incurred various
costs to accommodate General Wire's needs,
including without limitation hiring
professionals to redesign its products,
create molds and drawings of General Wire's
 housings, and other actions, all in order to
manufacture products to match General Wire's
exclusive needs.

10 10. In connection with their business

1 relationship, General Wire loaned Vision Tech
2 approximately \$400,000. That loan was
3 secured by a chattel mortgage on Vision
4 Tech's inventory, and was repaid in full in
5 August 2006.

6 11. In or about September 2002, General Wire
7 began ordering products from Vision Tech.
8 The course of dealing between the parties was
9 that General Wire would issue written
10 purchase orders to Vision Tech approximately
11 six (6) months in advance of General Wire's
12 requested ship date for those products. The
13 parties also agreed upon prices for these
14 products in advance, which prices changed
15 from time to time by mutual agreement.

16 12. General Wire also regularly provided
17 Vision Tech with sales projections for the
18 three (3) to six (6) months that followed, so
19 that Vision Tech could order and have on hand
20 sufficient quantities of component parts for
21 the manufacture of General Wire's products.
22 Vision Tech did in fact pre-order these
23 components from its vendors pursuant to
24 General Wire's sales projections. Most of
25 the components had to be specially
26 manufactured by Vision Tech's vendors,
because they contained General Wire's logo,
product name, specific product color scheme,
and other General Wire-specific features.

13 13. Vision Tech and General Wire also agreed
14 that Vision Tech would give volume discounts
15 for certain products if, in a particular
16 twelve-month period, General Wire ordered at
17 or above a minimum number of those certain
18 products. Not all products had volume
19 discounts, and no discount applied to any
20 product where General Wire's monthly
21 purchases for that product did not meet or
22 exceed the minimum monthly amount.

23 14. Beginning in September 2005, General
24 Wire sent sales projections and purchase
25 orders to Vision Tech for delivery of
26 products during the months of November 2005
through August 2006. After receiving those
sales projections and purchase orders, Vision
Tech ordered sufficient parts from its
vendors to manufacture General Wire's

1 products, and where a purchase order was
2 issued, began manufacturing products per
General Wire's purchase orders.

3 15. However, beginning in May 2006, General
4 Wire stopped making payments to Vision Tech
5 on products that it had ordered, including in
6 some cases products that Vision Tech had
already manufactured and shipped to General
Wire.

7 16. Also commencing in May 2006, General
8 Wire told Vision Tech not to ship any more
9 products, despite the fact that Vision Tech
had manufactured such products pursuant to
General Wire's purchase orders.

10 17. At the time General Wire ceased making
11 payments and accepting shipments, General
12 Wire knew that Vision Tech had ordered
13 components from its vendors according to
14 General Wire's sales projections. In some
15 cases, Vision Tech was able to cancel its
16 orders for these components. In other cases,
17 however, Vision Tech was unable to cancel
18 orders from its vendors. Where Vision Tech
19 was able to cancel its component orders from
its vendors, Vision Tech incurred
cancellation fees. Where Vision Tech was
unable to cancel its component orders, Vision
Tech was forced to purchase hundreds of
thousands of dollars worth of components,
many of which were specifically manufactured
with General Wire's name, the name of General
Wire's products, and/or other General Wire-
specific characteristics.

20 18. General Wire's failure and refusal to
21 pay for products Vision Tech had manufactured
22 and General Wire's unwillingness to make
23 further manufacturing orders based on General
Wire's prior sales projections, was the
proximate cause of severe financial damages
to Vision Tech.

24 19. Following the termination of the
25 exclusive supplier relationship between
26 Vision Tech and General Wire, Vision Tech
designed and created new products for sale
under its own name, including its Intruder
and Intruder Elite (formerly ProCam) video

1 inspection units. Vision Tech began to
2 market these products to the public in or
around February 2007.

3 20. By letter dated March 2, 2007, General
4 Wire, through its attorney, demanded that
5 Vision Tech 'cease and desist from ...
designing, manufacturing and promoting' its
Intruder and Intruder Elite products

6 21. In its demand letter, General Wire
7 asserts: 'As a result of both the
8 similarities and components of General Wire
9 and the attendant confusion in the
10 marketplace created by Vision Tech's
11 promotional efforts, we have discovered the
12 following: (1) Vision's ProCam closely
13 resembles General Wire's Gen-Eye Junior; (2)
14 Vision's ProCam includes, as component parts,
15 two custom springs that were specially
16 designed and manufactured by General Wire for
17 use in a General Wire product and for which
18 Vision never received licensing from General
19 Wire or in any way paid for the use of the
same; (3) Vision's ProCam includes a custom
General Wire-developed instruction label on
the inside cover of command module cover
door; (4) the drum, with the exception of a
slight color modification and name change, is
identical to the drum used in General Wire's
Gen-Eye Junior; (5) Vision is using a command
module that was developed in accordance with
custom specifications generated by General
Wire following significant time involvement
and investment in the development, trouble
shooting, and direction of the product by
General Wire.'

20 22. General Wire further contends in its
21 cease and desist letter that Vision Tech 'is
22 violating state and federal law, including,
but not limited to, federal copyright law.'

23 23. The allegations contained in General
24 Wire's cease and desist letter are false.
25 Vision Tech and its agents designed the
26 custom springs, instruction label and command
module. General Wire has no proprietary
rights in Vision Tech's Intruder or Intruder
Elite products or any of their component
parts.

1 24. There is no likelihood of confusion
2 between Vision Tech's products and General
Wire's products.

3 25. No actionable infringement or dilution
4 claim arises from Vision Tech's promotion and
sale of its Intruder and Intruder Elite
5 products.

6 26. No unfair competition claim arises from
Vision Tech's promotion and sale of its
7 Intruder and Intruder Elite products.

8 The FAC alleges the following causes of action:

9 1. First Cause of Action for breach of
contract - exclusive requirements contract;

10 2. Second Cause of Action for breach of
11 contract - purchase orders;

12 3. Third Cause of Action for promissory
estoppel;

13 4. Fourth Cause of Action for unjust
14 enrichment;

15 5. Fifth Cause of Action for common count -
goods sold and delivered;

16 6. Sixth Cause of Action for declaratory
17 judgment.

18 The Sixth Cause of Action alleges in pertinent part:

19 58. As a result of General Wire's cease and
20 desist letter, an actual case or controversy
exists between General Wire and Vision Tech
21 relating to Vision Tech's promotion and sale
of its Intruder and Intruder Elite products.

22 59. As Vision Tech is being threatened with
an action for damages and other relief,
23 Vision Tech is in need of, and entitled to, a
judicial declaration of each party's
24 respective rights and liabilities as they
pertain to Vision Tech's continued promotion
25 and sale of its Intruder and Intruder Elite
products, pursuant to 28 U.S.C. § 2201.

26 A Scheduling Order was filed on August 21, 2007 (Doc. 23).

1 Also on August 21, 2007, General Wire filed its Answer,
2 Affirmative Defenses, and Counterclaim (Doc. 24). The Twenty-
3 Second Affirmative Defense is captioned "Intellectual Property,
4 Including Trade Dress Claims."

5 Attached to General Wire's motion is a copy of a letter
6 dated August 21, 2007 from General Wire's attorney, Steven
7 Zoffer, to Benjamin Hall, then counsel for Vision Tech. The
8 August 21, 2007 states:

9 By way of follow-up to our discussions at the
10 time of our Rule 26(f) Conference and
11 Conference before Judge Wanger, General Wire
12 would be agreeable to not assert its
13 intellectual property claims regarding the
14 similarities between General Wire's Gen-Eye
15 products and Vision Tech's Intruder and
16 Intruder Elite products, which it would
17 otherwise intend to include by way of
18 counterclaim in this matter. In exchange,
19 and with the understanding that the only
20 basis for Vision Tech's declaratory judgment
21 action is the assertion of General Wire's
22 intellectual property rights, we would
23 propose an agreement by which General Wire
24 will forego its intellectual property claims
25 in exchange for a withdrawal of the
26 Plaintiff's declaratory judgment claim, as
set forth in the Complaint [sic]. This
proposal would have the effect of not only
narrowing the rather diverse disputes which
currently exist between the parties in an
effort to move this matter toward resolution,
but would also, we believe, significantly
conserve the parties' respective resources
which would be needed for discovery and
pursuing these claims through litigation.

23 As you know, including from General Wire's
24 March 2, 2007 correspondence, General Wire
25 takes the protection of its intellectual
26 property very seriously. Further, General
Wire strongly believes that Vision Tech's
Intruder and Intruder Elite products, as they
exist in their current versions, infringe

1 upon General Wire's intellectual property
2 rights. General Wire, however, also
3 understands that intellectual property
4 litigation is expensive and will entail
5 engineering experts, market confusion
6 experts, and surveys of the parties'
7 respective customers. To the extent the
8 parties currently are able to resolve the
9 declaratory judgment/intellectual property
10 component of this litigation, General Wire
11 would agree not to advance its current trade
12 dress, trade secret, and unfair competition
13 counterclaims which are directed to the
14 Intruder and Intruder Elite products being
15 offered by Vision Tech.

9 In this way, General Wire would not object to
10 Vision Tech's continued promotion and sale of
11 its current Intruder and Intruder Elite
12 products. In exchange, we would propose that
13 Vision Tech simply agree to the enclosed
14 Consent Motion, or, in the alternative, work
15 with General Wire to otherwise resolve the
16 declaratory judgment/intellectual property
17 component of this litigation at the current
18 time. Notwithstanding this proposal, General
19 Wire reserves the right to amend its Answer,
20 New Matter, and Counterclaim to include its
21 trade dress, trade secret, unfair competition
22 claims, as well as any related intellectual
23 property claims, in the event that General
24 Wire and Vision Tech cannot currently resolve
25 this issue.

18 Attached to Mr. Zoffer's letter is a pleading captioned "Consent
19 Motion to Withdraw Plaintiff's Declaratory Judgment Claim", which
20 states in pertinent part:

21 8. The parties have agreed to resolve [the
22 Sixth Cause of Action] ... and, accordingly,
23 request this Court enter the attached Order.

23 9. Specifically, in exchange for General
24 Wire's agreement to forego its intellectual
25 property counterclaims regarding the
26 similarities which General Wire believes to
exist between General Wire's Gen-Eye products
and Vision Tech's Intruder and Intruder Elite
products, Vision Tech, in turn, agrees to

1 withdraw its sixth cause of action requesting
2 a declaratory judgment.

3 10. General Wire specifically agrees not to
4 object to Vision Tech's continued promotion
5 and sale of the Intruder and Intruder Elite
6 products, as those products currently exist.

7 11. Vision Tech, therefore, no longer
8 requires a declaration from this Court
9 regarding its continued promotion and sale of
10 its Intruder and Intruder Elite products.

11 Attached to the Consent Motion is the following Order granting
12 the Consent Motion, withdrawing the Sixth Cause of Action, and
13 striking Paragraphs 57-59 of the FAC and Paragraph 10 of the
14 Prayer.

15 By letter dated September 13, 2007, Daniel Jamison, present
16 counsel for Vision Tech, responded:

17 Vision Tech[] ... will not enter into your
18 proposed Consent Motion. However, if General
19 Wire ... willing to stipulate to judgment in
20 Vision Tech's favor with respect to the trade
21 dress issue, adequately protecting Vision
22 Tech from any such future claims, we may be
23 able to work out an arrangement along those
24 lines, provided that General Wire also
25 stipulate that the remaining disputes
26 continue to be litigated in the Eastern
District of California. In the alternative,
the entire lawsuit could be resolved
immediately by (1) sufficient payment by
General Wire to Vision Tech and (2) an
agreement fully and finally resolving the
trade dress claims, so that each party can
proceed with its respective business without
interference from the other party.

27 A. General Wire's Motion to Dismiss or Transfer.

28 General Wire moves the Court "to enter the proposed Order of
29 Court attached to General Wire's Motion, disposing of Vision
30 Tech's claim for a declaratory judgment, entering a declaration

1 in favor of Vision Tech, and dismissing or transferring this
2 matter to the United States District Court for the Western
3 District of Pennsylvania on the basis of improper venue." The
4 proposed Order attached to General Wire's instant motion states
5 in pertinent part:

6 1. Plaintiff's sixth cause of action for a
7 declaratory judgment is dismissed, and
8 paragraphs 57, 58, and 59 of Plaintiff's
9 Amended Complaint, as well as paragraph 10
10 of Plaintiff's Prayer following Plaintiff's
11 Amended Complaint, are stricken.

12 2. Plaintiff may continue to promote and
13 sell its Intruder and Intruder Elite
14 products, as those products currently exist
15 and in their current versions, with the
16 understanding that Plaintiff's products shall
17 neither resemble the color or markings of
18 Defendant's Gen-Eye products nor display
19 Defendant's corporate or trade name.

20 3. The remainder of this action is
21 transferred to the United States District
22 Court for the Western District of
23 Pennsylvania. Because Plaintiff's
24 declaratory relief claim is moot and,
25 therefore, no longer validly existing in the
26 Eastern District of California, enforcement
of the forum selection clause contained in
the parties' purchase orders is reasonable.

As discussed in the July 17, 2007 Memorandum Decision, there
is a forum selection clause in General Wire's purchase orders:

19. LAW GOVERNING - Any contract resulting
from acceptance of this offer shall be
governed by the laws of the Commonwealth of
Pennsylvania. Venue for any suit by Seller
shall be in and only in the Pennsylvania
state court of proper jurisdiction in
Allegheny County, Pennsylvania, or the United
States District Court for the Western
District of Pennsylvania.

The July 17, 2007 Memorandum Decision ruled in pertinent part:

1 General Wire argues that Vision Tech's
2 reliance on these cases to defeat application
3 of the purchase orders' forum selection
4 clause is misplaced because five of the six
5 causes of action advanced by Vision stem
6 directly from the various purchase orders
7 that defined the parties' relationship.
8 General Wire further contends that the Sixth
9 Cause of Action for declaratory relief stems
10 indirectly from the purchase orders because,
11 without the purchase orders, the parties
12 would not have had a relationship. General
13 Wire argues that Vision Tech's case

14 is not broader, in terms of the
15 time period covered by the forum
16 selection clause, the parties, or
17 in any other way, than the
18 applicable purchase orders. All of
19 Vision Tech's claims relate either
20 directly or indirectly to the
21 purchase orders. Vision Tech has
22 failed to, and cannot, demonstrate
23 any unreasonableness of the agreed
24 upon forum selection clause.
25 Enforcement of the forum selection
26 clause will neither deprive Vision
Tech of its day in court nor
contradict sound judicial policy.
Frigate Ltd. . . ., Enforcement will
not subject claims to the forum
selection clause which originated
prior to the forum selection
clause's effective date. *Pegasus
Transp.*, 152 F.R.D. at 575.
Enforcement also will not subject
any individuals or entities to the
forum selection clause which were
not parties to he underlining [sic]
purchase orders. *Farmland Indus.,
Inc.*, 806 F.2d at 852.

27 This analysis is misplaced. Taking the
28 Complaint's allegations as true, Vision Tech
29 alleges that a broader contractual
30 arrangement was formed, only a portion of
31 which was represented by purchase orders.
32 General Wire is alleged to have agreed to
33 exclusively purchase from Vision Tech all
34 General Wire's requirements for sewer line
35 inspection and maintenance products. An

1 additional contract, executed by part
2 performance that caused Vision Tech to
3 purchase large numbers of parts to its
4 economic detriment, is also alleged.

5 The motion to dismiss or transfer this action
6 based on the forum selection clause is
7 DENIED. As Vision Tech argues, not all of
8 its claims are based on breach of the
9 purchase orders and its claim for declaratory
10 relief as to an intellectual property dispute
11 is not based on a contract resulting from a
12 purchase order. Because the declaratory
13 relief claim is validly brought in the
14 Eastern District of California, enforcement
15 of the forum selection clause is
16 unreasonable.

17 In support of the instant motion, General Wire contends:

18 In light of General Wire's current
19 willingness to forego its intellectual
20 property claims so that the choice of law and
21 venue in its purchase orders may be given the
22 intended effect, Vision Tech's declaratory
23 judgment claim is now moot. To the extent
24 that General Wire will not object to Vision
25 Tech's continued promotion and sale of its
26 Intruder and Intruder Elite products, as
those products currently exist in their
current versions, Vision Tech no longer
requires the requested declaration.
Accordingly, and consistent with the Court's
prior ruling, enforcement of the forum
selection clause contained in the parties'
purchase order terms and conditions is no
longer unreasonable, and the remainder of
this action properly should be transferred to
the Western District of Pennsylvania.

Vision Tech opposes General Wire's motion.

First, Vision Tech contends, the motion is "procedurally
defective". Although the motion is based on Rule 12(b)(3),
Vision Tech argues that it is confusing and appears to be a
motion to strike and/or for summary judgment because of language
in the proposed Order striking allegations of the FAC and the

1 language in the proposed Order withdrawing Vision Tech's Sixth
2 Cause of Action as long as Vision Tech's products do not resemble
3 General Wire's products. Vision Tech contends that the motion
4 does not comply with Rule 7(b)(1), Federal Rules of Civil
5 Procedure, because it does not state the grounds with
6 particularity; and the proposed Order purports to withdraw the
7 infringement claim but then requests the court to protect General
8 Wire from infringement. Vision Tech contends that, if the motion
9 is characterized as one to strike, it is untimely. If the motion
10 is characterized as one for partial summary judgment in favor of
11 Vision Tech, it is not authorized by Rule 56, Federal Rules of
12 Civil Procedure, which authorizes "motions for summary judgment
13 by a party making a claim against the opposing party in the
14 former's favor and by a party opposing a claim against the party
15 making the claim in favor of the party opposing the claim, not in
16 favor of the party making the claim!"

17 While General Wire's motion is awkwardly worded, it is clear
18 that General Wire is attempting to remove what it believes is the
19 only obstacle to enforcement of the forum selection clause in the
20 purchase orders. Therefore, although the motion and proposed
21 Order uses the term "strike", the motion clearly is not a Rule
22 12(f) motion. Vision Tech's reference to summary judgment is
23 meaningless given the context of General Wire's motion.

24 Vision Tech further argues that General Wire has misread the
25 July 17, 2007 Memorandum Decision. As Vision Tech correctly
26 notes, denial of the motion to dismiss or transfer was not based

1 solely on the existence of the Sixth Cause of Action.¹

2 General Wire replies that the July 17, 2007 Memorandum
3 Decision "determined that the propriety of venue in the Eastern
4 District of California was contingent upon Vision Tech's seeking
5 declaratory relief" and that the Court "indicated that Vision
6 Tech's declaratory relief claim was broader than the parties'
7 agreed upon forum selection clause that properly governed Vision
8 Tech's remaining contractually based claims."

9 General Wire's reading of the July 17, 2007 Memorandum
10 Decision is incorrect. To repeat, the July 17, 2007 Memorandum
11 Decision ruled:

12 This analysis is misplaced. Taking the
13 Complaint's allegations as true, Vision Tech
14 alleges that a broader contractual
15 arrangement was formed, only a portion of
16 which was represented by purchase orders.
17 General Wire is alleged to have agreed to
18 exclusively purchase from Vision Tech all
19 General Wire's requirements for sewer line
20 inspection and maintenance products. An
21 additional contract, executed by part
22 performance that caused Vision Tech to
23 purchase large numbers of parts to its
24 economic detriment, is also alleged.

25 The motion to dismiss or transfer this action
26 based on the forum selection clause is

21 ¹Vision Tech further argues that a partial summary judgment in
22 Vision Tech's favor on the Sixth Cause of Action will not remove
23 the claim from the case because the Court could later reconsider
24 unless judgment pursuant to Rule 54(b), Federal Rules of Civil
25 Procedure, is granted. General Wire is not moving for partial
26 summary judgment but is seeking an order withdrawing the Sixth
Cause of Action and transferring the case to Pennsylvania. Vision
Tech further notes that General Wire's Twenty-Second Affirmative
Defense relates to its intellectual property claims. However,
General Wire's responsive pleading can be amended if the motion is
granted.

1 DENIED. As Vision Tech argues, not all of
2 its claims are based on breach of the
3 purchase orders and its claim for declaratory
4 relief as to an intellectual property dispute
5 is not based on a contract resulting from a
6 purchase order. Because the declaratory
7 relief claim is validly brought in the
8 Eastern District of California, enforcement
9 of the forum selection clause is
10 unreasonable.

11 General Wire's basic premise, that its stipulation to
12 resolution of the declaratory relief claim mandates transfer of
13 venue of this action pursuant to the forum selection clause in
14 the purchase orders, is without merit. General Wire's second
15 motion to dismiss or transfer is DENIED.

16 B. Vision Tech's Countermotion to File Second Amended
17 Complaint.

18 Vision Tech moves for leave to file a Second Amended
19 Complaint to add causes of action for inducement of breach of
20 contract, and intentional and negligent interference with
21 prospective economic advantage, respecting the alleged damage
22 done to Vision Tech in 2007 when General Wire in bad faith
23 falsely told Rycom Instruments, Inc. and other vendors that
24 Vision Tech was infringing on General Wire's intellectual
25 property. Vision Tech contends that General Wire's "judicial
26 concession at this time that Vision Tech should have judgment on
its declaratory relief claim confirms GWS's misconduct and
defamation." In addition, the proposed Second Amended Complaint
alleges a claim against Arthur Silverman and General Wire for
breach of fiduciary duty:

1 The acts of GWS and Arthur Silverman were
2 part of a scheme on the part of GWS and
3 Arthur Silverman, who was GWS's Chief
4 Executive Officer, to take advantage of
5 Arthur Silverman's fiduciary position as a
6 member of Vision Tech's Board of Directors
7 and his access to Vision Tech's confidential
information to enable GWS to bankrupt Vision
Tech and take over Vision Tech's California
business. GWS's conduct not only included
Mr. Silverman's breach of his fiduciary
duties, but included defaming Vision Tech to
Rycom and others

8 Vision Tech contends that leave to amend should be granted
9 "because it is early in this case and there has been no
10 prejudicial delay." If leave to file the Second Amended
11 Complaint is granted, Vision Tech argues, the new causes of
12 action described above negate any reliance on the forum selection
13 clause in the purchase orders to dismiss or transfer venue of the
14 action pursuant to the cases cited in the July 17, 2007
15 Memorandum Decision.

16 Rule 15(a), Federal Rules of Civil Procedure, provides that
17 "leave [to amend] shall be freely given when justice so
18 requires." "The purpose of pleading is 'to facilitate a proper
19 decision on the merits' ... and not erect formal and burdensome
20 impediments to the litigation process. Unless undue prejudice to
21 the opposing party will result, a trial judge should ordinarily
22 permit a party to amend its complaint." *Howey v. United States*,
23 481 F.2d 1187, 1990 (1973). However, "[t]his strong policy
24 toward permitting the amendment of pleadings ... must be tempered
25 with considerations of 'undue delay, bad faith or dilatory motive
26 on the part of the movant, repeated failure to cure deficiencies

1 by amendments previously allowed, undue prejudice to the opposing
2 party by virtue of allowance of the amendment, futility of
3 amendment, etc.' *Foman v. Davis*, 371 U.S. 178, 182 ... (1962)."
4 *Schlacter-Jones*, 936 F.2d 455, 443 (9th Cir. 1991).

5 General Wire argues that leave to amend should be denied.
6 General Wire asserts that the basis for Vision Tech's motion for
7 leave to amend is its recognition that the remaining
8 contractually based claims should be transferred to the Western
9 District of Pennsylvania pursuant to the forum selection clause
10 and that Vision Tech feels compelled "to invent new theories of
11 tort liability against General Wire and now its CEO ... for the
12 purpose of improperly bootstrapping this litigation to the
13 Eastern District of California." General Wire contends that
14 Vision Tech's motion for leave to amend "emit[s] themes of bad
15 faith, dilatory motive, prior amendments, futility of currently
16 sought amendment, and undue delay."

17 As discussed above, even if the stipulation sought by
18 General Wire with regard to the declaratory relief claim is
19 accepted, the July 17, 2007 Memorandum Decision denied transfer
20 on other grounds. General Wire's claim of bad faith in seeking
21 leave to amend fails for this reason.

22 General Wire's contention that leave to amend should be
23 denied because of Vision Tech's dilatory motive and undue delay
24 is unpersuasive given the circumstances of this litigation. The
25 parties have not completed discovery, the discovery cut-off date
26 being July 30, 2008. Jury trial is set for December 9, 2008.

1 The fact that Vision Tech has already filed an amended
2 complaint in response to the July 17, 2007 Memorandum Decision
3 does not compel denial of this motion. In *DCD Programs, Ltd. v.*
4 *Leighton*, 833 F.2d 183, 186 n.4 (9th Cir.1987), the Ninth Circuit
5 noted:

6 Another factor occasionally considered when
7 reviewing the denial of a motion for leave to
8 amend is whether the plaintiff has previously
9 amended her complaint. In *Mir v. Fosberg*,
10 646 F.2d 342 (9th Cir.1980), the plaintiff
11 had amended his complaint once. Both the
12 original complaint and the amended one were
13 dismissed for lack of jurisdiction. When the
14 plaintiff requested leave to file a second
15 amended complaint, the district court denied
16 the motion. In affirming the denial, this
17 court held that a district court's discretion
18 over amendments is especially broad 'where
19 the court has already given a plaintiff one
20 or more opportunities to amend his complaint
21'

22 Here, the FAC was filed in response to the Memorandum Decision
23 addressing General Wire's first motion to dismiss for failure to
24 state a claim. The proposed Second Amended Complaint is not
25 another effort to state a claim in response to that motion to
26 dismiss but, rather seeks to allege new and different claims for
relief. This is not a situation in which a plaintiff repeatedly
tries unsuccessfully to state a claim.

 General Wire argues that leave to amend should be denied on
the ground of futility. General Wire argues that the proposed
Seventh Cause of Action for inducement of breach of contract, the
Eighth Cause of Action for intentional interference with
prospective economic advantage, and the Ninth Cause of Action for

1 negligent interference with prospective economic advantage, are
2 futile because these claims "are intertwined with the parties'
3 contractual relationship, including the purchase orders."

4 General Wire cites *eToll, Inc. v. Elias/Savion Advertising,*
5 *Inc.*, 811 A.2d 10 (Pa.Super.2002), for the proposition that
6 Pennsylvania's "gist of the action" doctrine precludes these
7 causes of action:

8 Generally, the doctrine is designed to
9 maintain the conceptual distinction between
10 breach of contract claims and tort claims ...
11 As practical matter, the doctrine precludes
12 plaintiffs from re-casting ordinary breach of
13 contract claims into tort claims ... The *Bash*
14 Court explained the difference between
15 contract claims and tort claims as follows:

16 [a]lthough they derive from a
17 common origin, distinct differences
18 between civil actions for tort and
19 contract breach have developed at
20 common law. Tort actions lie for
21 breaches of duties imposed by law
22 as a matter of social policy, while
23 contract actions lie only for
24 breaches of duties imposed by
25 mutual consensus agreements between
26 particular individuals ... To
27 permit a promisee to sue his
28 promisor in tort for breaches of
29 contract inter se would erode the
30 usual rules of contractual recovery
31 and inject confusion into our well-
32 settled forms of actions.

33 ...

34 Thus, '[a]lthough mere nonperformance of a
35 contract does not constitute a fraud[,] it is
36 possible that a breach of contract also gives
37 rise to an actionable tort[.] To be construed
38 as a tort, however, the wrong ascribed to
39 defendant must be the gist of the action, the
40 contract being collateral ... 'The important
41 difference between contract and tort actions

1 is that the latter lie from the breach of
2 duties imposed as a matter of social policy
3 while the former lie for the breach of duties
4 imposed by mutual consensus.' ... 'In other
5 words, a claim should be limited to a
6 contract claim when "the parties' obligations
7 are defined by the terms of the contracts,
8 and not by the larger social policies
9 embodied in the law of torts.'

6 811 A.2d at 14.

7 General Wire asserts that California recognizes a similar
8 doctrine, "the economic loss doctrine." The case cited by
9 General Wire, *Apollo Group, Inc. v. Avnet, Inc.*, 58 F.3d 477 (9th
10 Cir.1995), involved Arizona law, not California law.

11 In *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal.4th
12 979 (2004), the California Supreme Court explained the "economic
13 loss doctrine":

14 [T]he economic loss rule provides: "' [W]here
15 a purchaser's expectations in a sale are
16 frustrated because the product he bought is
17 not working properly, his remedy is said to
18 be in contract alone, for he has suffered
19 only "economic" losses.'" This doctrine
20 hinges on a distinction drawn between
21 transactions involving the sale of goods for
22 commercial purposes where economic
23 expectations are protected by commercial and
24 contract law, and those involving the sale of
25 defective products to individual consumers
26 who are injured in a manner which has
traditionally been remedied by resort to the
law of torts.' ... The economic loss rule
requires a purchaser to recover in contract
for purely economic loss due to disappointed
expectations, unless he can demonstrate harm
above and beyond a broken contractual promise
... Quite simply, the economic loss rule
'prevent[s] the law of contract and the law
of tort from dissolving into the other.'

34 Cal.4th at 988.

1 As Vision Tech argues, the proposed Seventh, Eighth and
2 Ninth Causes of Action do not recast breach of contract claims
3 into tort claims:

4 GWS's interference with Vision Tech's
5 contract and prospective relations with
6 Rycom, having occurred after Vision Tech's
7 contractual relationship with GWS had ended
8 and having resulted from GWS's false
9 assertions that Vision Tech was infringing on
10 GWS' intellectual property, are obviously
11 distinct torts from the claims for breach of
12 the Exclusive Requirements Contract and
13 Breach of Purchase Orders.

14 General Wire argues that the proposed amendment to add
15 Arthur Silverman as a defendant violates Rule 20(a), Federal
16 Rules of Civil Procedure:

17 ... All persons ... may be joined in one
18 action as defendants if there is asserted
19 against them jointly, severally, or in the
20 alternative, any right to relief in respect
21 of or arising out of the same transaction,
22 occurrence, or series of transactions or
23 occurrences and if any question of law or
24 fact common to all defendants will arise in
25 the action.

26 General Wire contends that Vision Tech's proposed Tenth Cause of
Action against Arthur Silverman for breach of fiduciary duty in
his individual capacity as a member of Vision Tech's board of
directors, is unrelated to this case and does not arise out of
the related transactions or occurrences.

The proposed Second Amended Complaint alleges that Silverman
was the CEO and principal owner of General Wire; that it was
agreed by Vision Tech and General Wire that Silverman would
become a member of Vision Tech's board of directors; that

1 Silverman was a member of Vision Tech's board of directors from
2 July 2002 to November 2006; that, during his tenure as a member
3 of Vision Tech's board of directors, Silverman disclosed to
4 General Wire confidential proceedings of Vision Tech's board of
5 directors, disclosed Vision Tech's confidential proprietary trade
6 secrets and information to General Wire, sought to use his
7 position as a member of Vision Tech's board to the advantage of
8 General Wire over Vision Tech, and, during the period 2005-2006,
9 sought to use his position as board member of Vision Tech to
10 bankrupt Vision Tech and drive it out of business so that General
11 Wire would acquire Vision Tech's business and assets in
12 California at little or no cost.

13 Rule 20(a) is satisfied because the claims against General
14 Wire and Silverman involve the same transactions or occurrences,
15 referring to the allegation in the proposed Tenth Cause of Action
16 that Silverman breached his fiduciary duties to Vision Tech by:

17 assisting General Wire to obtain Vision
18 Tech's confidential pricing and other
19 information from Vision Tech vendors who were
20 subject to confidentiality agreements so that
21 General Wire could use the confidential
22 information to obtain cost savings from
23 Vision Tech; assisted General Wire with
24 taking advantage of Vision Tech's reliance on
25 and vulnerability from, the exclusive
26 requirements contract alleged above; stymied
and interfered with Vision Tech's ability to
correct, resist, and rebut the overreaching
of General Wire.

24 Vision Tech's motion for leave to file the proposed Second
25 Amended Complaint is GRANTED. Pursuant to Rule 15(a), leave
26 should be freely granted and General Wire is not persuasive in

1 contending that the factors militating against leave to amend are
2 present.

3 CONCLUSION

4 For the reasons set forth above:

5 1. Defendant General Wire Spring Company's motion to
6 dismiss or transfer is DENIED;

7 2. Plaintiff Vision Technology Design & Manufacturing
8 Inc.'s motion for leave to file that proposed Second Amended
9 Complaint is GRANTED; and

10 3. Plaintiff shall file the proposed Second Amended
11 Complaint within five court days of the filing date of this
12 Memorandum Decision and Order.

13 IT IS SO ORDERED.

14 Dated: February 4, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE