IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAQUET CARDIOVASCULAR LLC,

Plaintiff,

v.

SAPHENA MEDICAL, INC., and ALBERT CHIN,

Defendants.
_____/

No. C 16-07213 WHA

ORDER RE MOTION FOR LEAVE TO FILE AMENDED COUNTERCLAIM AND MOTION TO STAY, SEVER, OR BIFURCATE

INTRODUCTION

Following dismissal of its antitrust counterclaim, one defendant in this patent infringement action moves for leave to file an amended counterclaim. Plaintiff opposes and, in the event leave to amend is granted, revives its motion to stay, sever, or bifurcate the amended counterclaim. Defendant's motion for leave to amend is **GRANTED IN PART** and **DENIED IN PART**. Plaintiff's motion to stay, sever, or bifurcate is **GRANTED IN PART** and **DENIED IN PART**.

STATEMENT

Plaintiff Maquet Cardiovascular LLC and defendant Saphena Medical, Inc. (founded by former Maquet employee and defendant Dr. Albert Chin), both sell medical devices designed for endoscopic vessel harvesting (EVH) procedures. Maquet brought this action against Saphena and Dr. Chin for patent infringement, breach of contract, false advertising in violation of the Lanham Act, and correction of inventorship. Saphena and Dr. Chin both answered.

Saphena alone asserted counterclaims against Maquet for (1) below-cost sales in violation of Section 17043, (2) tortious interference with prospective business relationships, (3) unfair competition in violation of Section 17200, (4) loss leaders in violation of Section 17044, (5) false advertising in violation of the Lanham Act, (6) attempted monopolization in violation of Section 2 of the Sherman Act, and (7) unfair competition in violation of Massachusetts law.[1]

A prior order dated May 26 (Dkt. No. 82) granted Maquet's motion to dismiss Saphena's counterclaim under Federal Rule of Civil Procedure 12(b)(6) and held in abeyance Maquet's concurrent motion to stay, sever, or bifurcate the counterclaim (*see* Dkt. No. 63). Pursuant to the May 26 order, Saphena now moves for leave to file an amended counterclaim (Dkt. No. 86). Its proposed amendment would drop two claims for relief under the Lanham Act and Massachusetts law, add two claims for declaratory judgment of patent non-infringement, and add one claim for declaratory judgment of patent invalidity. Maquet opposes Saphena's motion and, in case leave to amend is granted, revives its own motion to stay, sever, or bifurcate the counterclaim (Dkt. No. 100). This order follows full briefing and oral argument.

ANALYSIS

1. SAPHENA'S MOTION FOR LEAVE TO FILE AN AMENDED COUNTERCLAIM.

Rule 15(a)(2) advises, "The court should freely give leave when justice so requires." In ruling on motions for leave to amend, courts consider (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the movant has previously amended their pleading. *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2003). Prejudice to the opposing party is the most important factor. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Absent prejudice or a strong showing of another factor, there is a presumption under Rule 15(a) in favor of granting leave to amend. *Ibid.* Nevertheless, futility alone can justify denying leave to amend. *Nunes*, 375 F.3d at 808; *see also Ebner v. Fresh, Inc.*, 838 F.3d 958, 968 (9th Cir. 2016).

[1] All statutory citations herein are to sections of the California Business and Professions Code unless otherwise specified.

Maquet contends leave to amend should be denied here because (1) Saphena's proposed amendment would be futile as to most of its claims, and (2) Saphena proposed its amendment in bad faith. This order addresses each contention in turn.

A. Whether Saphena's Proposed Amendment Would Be Futile.

Maquet's argument about futility is directed only to Saphena's returning counterclaims for violations of California law, tortious interference, and violation of the Sherman Act. For purposes of assessing futility on this motion, the legal standard is the same as it would be on a motion to dismiss, *i.e.*, the counterclaim must plead "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility when the party asserting it pleads factual content that allows the court to draw the reasonable inference that the other side is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This analysis generally considers only allegations in the pleadings, attached exhibits, and matters properly subject to judicial notice. Factual allegations in the counterclaim are accepted as true and construed in the light most favorable to Saphena. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030–31 (9th Cir. 2008).

(1) Below-Cost Sales.

Section 17043 makes it "unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition." Saphena's proposed amended counterclaim alleges that Maquet, as part of its campaign to "protect" its own customers and "attack" Saphena, has sold or given away products at a loss to itself — including through discounts and giveaways outside of bundling arrangements. Saphena further alleges that Maquet specifically targets these discounts and giveaways, which involve products directly competing with Saphena's product, to customers that are considering a purchase from Saphena (*see* Dkt. No. 86-2 ¶¶ 71–78, 105–10).

Rather than discuss the legal sufficiency of these factual allegations as pled, Maquet attacks as "wild[] mischaracteriz[ation]" Saphena's reliance on certain documents — for example, a sales data spreadsheet — obtained from Maquet. This attack misses the point.

Maquet ridicules Saphena for "apparently want[ing] the Court to believe that Maquet, after investing $750 million in EVH technology and acquiring 85% market share, gives away millions of dollars' worth of product every year for the sole purpose of undercutting Saphena," but at the pleading stage, Saphena's well-pled factual allegations are entitled to the presumption of truth — even without reference to any documentary evidence.

Maquet submits a declaration from Christopher Schulte, vice president of operations at its United States sales branch, who contends Saphena incorrectly interpreted the raw sales data in the spreadsheet it cited. The Schulte declaration is not part of the pleading or attached exhibits, nor is it properly subject to judicial notice. It is therefore an improper basis on which to challenge the sufficiency of Saphena's proposed amended counterclaim. Maquet's argument about the correct interpretation of the raw sales data goes to the evidence supporting Saphena's position, not to the pleadings, and is premature at this stage. Insofar as Maquet points out that Saphena irresponsibly misused the raw sales data, however, that problem is addressed below within the context of Maquet's motion to stay, sever, or bifurcate.

The same defect underlies Maquet's related argument that Saphena incorrectly inferred Maquet's alleged "injurious intent or purpose" from its internal documents. Maquet offers alternative, innocent explanations for those documents, but again, such arguments are most improper at the pleading stage.

Maquet also cites the May 26 order, which rejected Saphena's prior argument that Maquet sells products below cost merely because it offers "bundle arrangements." True, that argument was and remains meritless, but Saphena's allegations in the proposed amended counterclaim are no longer limited to simple bundling. Rather, Saphena alleges that Maquet sells or gives away products at a loss — even outside of bundling arrangements — for the purpose of injuring or destroying competition with Saphena. That is sufficient to state a claim for below-cost sales at the pleading stage.

Maquet then alleges that Saphena itself "routinely gives away free products to customers" and derides "Saphena's outlandish attempt to hold Maquet liable for a ubiquitous business practice . . . that Saphena itself employs." Maquet's suggestion that two wrongs make

a right is a non-starter. Even if Saphena might itself be liable for below-cost sales, that is irrelevant to the sufficiency of its allegations that *Maquet* is liable for below-cost sales.

In summary, Saphena has pled sufficient factual allegations to permit the inference that Maquet is liable for below-cost sales in violation of Section 17043. Leave to amend as to this counterclaim is therefore **GRANTED**.

(2) Loss Leaders.

Section 17044 makes it "unlawful for any person engaged in business within this State to sell or use any article or product as a 'loss leader' as defined in Section 17030 of this chapter." Section 17030 defines "loss leader" as any article or product sold at less than cost where (a) the purpose is to induce, promote, or encourage the purchase of other merchandise; (b) the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or (c) the effect is to divert trade from or otherwise injure competitors.

For the same reasons as stated above within the context of Saphena's Section 17043 claim, Saphena has pled sufficient factual allegations to permit the inference that Maquet is liable under Section 17044 because it sells or gives away products as loss leaders with the effect of diverting trade from or otherwise injuring Saphena. Leave to amend as to this counterclaim is therefore **GRANTED**.

(3) Unfair Competition.

Section 17200 prohibits "unfair competition," meaning "any unlawful, unfair or fraudulent business act or practice . . . ." As stated, Saphena's proposed amended counterclaim includes sufficient factual allegations to state claims for relief for violations of Sections 17043 and 17044. This alone suffices to state a claim under Section 17200. Leave to amend as to this counterclaim is therefore **GRANTED**.

(4) Tortious Interference.

The elements of the tort of intentional interference with prospective economic advantage in this case are (1) an economic relationship between Saphena and some third party, with probable future economic benefit to Saphena, (2) Maquet's knowledge of the relationship, (3) intentional acts by Maquet designed to disrupt the relationship, (4) actual disruption of the

relationship, and (5) economic harm to Saphena proximately caused by Maquet's acts. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003).

The May 26 order dismissed Saphena's prior tort counterclaim because it failed to allege facts showing probable future economic benefit to Saphena from an economic relationship with some third party, or showing that Maquet knew of any such relationship. In its proposed amended counterclaim, Saphena adds allegations that its "well-known and highly respected founders," Dr. Chin and Mike Glennon, have built relationships with prospective customers in the "highly interconnected" EVH industry for years to allow Saphena to "get in the door" with its products. Saphena further alleges that Maquet knew of these relationships and in fact tracked them in order to target its interception strategies, and that this interception actually caused prospective customers to turn away from working with Saphena (*see* Dkt. No. 86-2 ¶¶ 53–54, 86–89). Finally, as stated, Saphena sufficiently alleges that at least some components of Maquet's interception strategies separately violated California law. *See CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1107–08 (9th Cir. 2007) ("[I]nterference with prospective economic advantage requires . . . an act that is wrongful independent of the interference itself." (citation omitted)).

Maquet contends that prior existing relationships in the EVH industry forged by Saphena's founders are irrelevant because Saphena's hope that those relationships would translate into sales remains "mere speculation." Not so. Unlike Saphena's initial counterclaim, which referenced only "potential customers," its proposed amended counterclaim permits the inference of probable future economic benefit to Saphena based on the unique preexisting economic relationships between Saphena's founders and at least some of its potential customers in the EVH industry. The mere fact that Saphena had not yet consummated sales agreements with those customers at the time of Maquet's alleged interference does not necessarily defeat its claim. *See, e.g., Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 904 (9th Cir. 1983) (allegations showing a "colorable economic relationship" with "the potential to develop into a full contractual relationship" suffice to survive dismissal (citations omitted)). Leave to amend as to this counterclaim is therefore **GRANTED**.

(5) Violation of the Sherman Act.

A claim for attempted monopolization under Section 2 of the Sherman Act in this case requires (1) that Maquet engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). Specifically, to prevail on a predatory pricing claim, Saphena must demonstrate that (1) the prices complained of are below an appropriate measure of Maquet's costs, and (2) there is a dangerous probability that Maquet will be able to recoup its investment in below-cost prices. *See Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 451 (2009) (quotations and citations omitted).

As the Supreme Court has noted, "the success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 231–32 (1993) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)). Our court of appeals has also held that, "while market share is just the starting point for assessing market power . . . market share, at least above some level, could support a finding of market power in the absence of contrary evidence. *Where such an inference is not implausible on its face, an allegation of a specific market share is sufficient, as a matter of pleading, to withstand a motion for dismissal.*" *Cost Mgmt. Servs., Inc. v. Wash. Natural Gas Co.*, 99 F.3d 937, 950–51 (9th Cir. 1996) (quoting *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980), with added emphasis). Moreover, "[w]hether or not market power is considered a 'separate' element of the attempt action, the existence of market power is relevant to drawing the inference of specific intent from conduct, except where the conduct is clearly threatening to competition." *Hunt-Wesson*, 627 F.2d at 926 (citations and footnote omitted).

Here, as stated, Saphena's proposed amended counterclaim sufficiently alleges that Maquet sold or gave away products below cost in violation of California law and with the specific intent to exclude competitors, including Saphena, from the EVH market. Moreover, Saphena alleges that Maquet already "controls" approximately 85 percent of the market for

EVH devices, which is "highly concentrated" with "only three principal suppliers" — Maquet, Saphena, and a non-party, Terumo (*see* Dkt. No. 86-2 ¶¶ 53, 142).

Maquet argues that Saphena's proposed amended counterclaim nevertheless does not allege facts showing a dangerous probability of recoupment because "Maquet faces competition from three separate competitors — Saphena, Terumo, and LivaNova-Sorin — and there is no allegation that Maquet has ***any*** probability of excluding ***all*** of these competitors from the relevant market" (Dkt. No. 100 at 13). Maquet provides no legal authority for its suggestion that, in order to allege a dangerous probability of recoupment at the pleading stage, Saphena must allege that Maquet has a probability of excluding *all* competitors from the EVH market. Even without such an allegation, Saphena's proposed amended counterclaim, taken as a whole, alleges sufficient facts to permit the inference that Maquet has a dangerous probability of recoupment and is liable for attempted monopolization under Section 2 of the Sherman Act. Leave to amend as to this counterclaim is therefore **GRANTED**.

B. Whether Saphena Proposed Its Amendment in Bad Faith.

Separately and in addition to arguing futility, Maquet protests that Saphena's motion should be denied based on a finding of bad faith because the proposed amended counterclaim relies on (1) "baseless theories" and "speculative distortion of information and documents produced in this action" (Dkt. No. 100 at 17, 22–24), and (2) "confidential Maquet documents that were used improperly" and never produced by either side in this action (*see id.* at 17–22). As explained, Maquet's first point is meritless. At this stage, the relevant question is whether Saphena has pled its counterclaims with sufficient factual allegations, not whether it has provided sufficient evidentiary support to prove up those counterclaims.

Maquet's second point about Saphena's reliance on previously-undisclosed "confidential documents" of "suspect origin" is likewise unavailing. Maquet cites non-binding decisions that denied leave to amend based *in part* upon findings of bad faith under circumstances readily distinguishable from our case. *See GSS Props., Inc. v. Kendale Shopping Ctr., Inc.*, 119 F.R.D. 379, 380–81 (M.D.N.C. 1988) (Judge Russell Eliason) (finding blatant delay and bad faith where plaintiff belatedly sought amendment to add new allegations it

"clearly knew" of prior to filing suit, apparently for the "ulterior purpose of either attempting to force defendant to settle or punishing defendant for failing to settle"); *Horton v. Vinson*, No. 1:14CV192, 2015 WL 4774276, at *29–30 (N.D. W. Va. Aug. 12, 2015) (Judge Irene Keeley) (finding futility and bad faith where plaintiff belatedly sought amendment to add "new" allegations he "clearly knew of" at the time of a previous amendment, apparently for the purpose of pleading around limitations surfaced in motion practice).

"Where there is lack of prejudice to the opposing party and the amended [pleading] is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny [a motion for leave to amend]." *Hurn v. Retirement Fund Trust of Plumbing, Heating & Piping Indus. of S. Cal.*, 648 F.2d 1252, 1254 (9th Cir. 1981) (quoting *Howey v. United States*, 481 F.2d 1187, 1190–91 (9th Cir. 1973)). If Maquet has grievances against Saphena based on its alleged discovery misconduct, including any alleged failure to disclose or produce documents, then it should raise those grievances in a discovery motion. Under these circumstances, however, this order declines to bar Saphena's proposed amendment based on Maquet's accusations of "bad faith."

C. Saphena's Newly-Added Counterclaims for Declaratory Judgment.

In its opposition brief, Maquet expressly declines to address Saphena's newly-added counterclaims for declaratory judgment, aside from commenting that those counterclaims "were not authorized under the Court's Order [and] are entirely duplicative of certain of Saphena's affirmative defenses" (Dkt. No. 100 at 5–6).

Contrary to Maquet's suggestion, the May 26 order did not limit the range of potential amendments that Saphena could propose. That being said, Saphena's newly-added counterclaims for declaratory judgment would serve no appreciable purpose in the case and appear to be a litigation gimmick to preemptively defend against Maquet's motion to stay, sever, or bifurcate. Such counterclaims would be subject to striking under Rule 12(f). *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (Rule 12(f) allows a district court to strike from a pleading any redundant or immaterial matter "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing

with those issues prior to trial"). Given this futility, leave to amend as to Saphena's counterclaims for declaratory judgment is **DENIED**.

2. MAQUET'S MOTION TO STAY, SEVER, OR BIFURCATE.

In concluding that Saphena has alleged sufficient factual material at this stage to plead claims for relief notwithstanding the collateral evidentiary disputes already emerging between the parties, this order in no way blesses the evidentiary errors in the proposed amendment. As explained, contrary to Maquet, those errors do not warrant denial of leave to amend under these circumstances, and these and other evidentiary disputes should ultimately be resolved after the pleading stage. So, Saphena lives to fight another day. The Court is, however, disappointed that counsel for Saphena misused information obtained from Maquet in seeking leave to amend.

Specifically, during oral argument on these motions, the Court asked Saphena's counsel to explain how Saphena inferred the numbers of EVH products that Maquet supposedly gave away or sold at a loss in 2014–2017 from the spreadsheets appended as Exhibits 14–17 to the proposed amendment. Counsel could not explain those numbers at the hearing — despite a recess to allow him to do so — but nevertheless insisted on their accuracy. Afterwards, in response to a follow-up order requiring a declaration on this point (Dkt. No. 132), counsel finally admitted to erroneously counting up the number of line items supposedly supporting inferences of below-cost sales (Dkt. No. 136). It has become clear that, while some line items still arguably support Saphena's position (at least at the pleading stage), the numbers offered in the proposed amendment were vastly exaggerated in Saphena's favor.[2]

Having considered the foregoing events, including Saphena's severe misuse of evidence as well as Maquet's motion and Saphena's opposition thereto, the Court finds that these circumstances present too great a risk that Saphena will simply use discovery on its antitrust counterclaim to overwhelm Maquet (the original plaintiff here) and prevent a fair adjudication of its patent and related grievances. This order therefore **STAYS** all discovery and other proceedings as to the counterclaim until further order of the Court. If Maquet abuses the

[2] In addition to the declaration, Saphena's counsel also filed an administrative motion for permission to lodge a letter of apology with the Court (Dkt. No. 137). The motion is **GRANTED** and counsel's apology is accepted. Nevertheless, a mistake of this magnitude can have consequences, as here.

process through discovery or motion practice, then Saphena may be permitted to proceed more promptly on its counterclaim. We will eventually reactivate the antitrust counterclaim for discovery and trial but for now the first order of business will be the patent suit by Maquet.

It remains premature to decide at this stage whether and to what extent the complaint and counterclaim might eventually be consolidated for some purposes, bifurcated, or tried together, all of which remain possible options. Thus, except for the stay, Maquet's motion is **DENIED** without prejudice to the possibility that additional case management might be warranted as this litigation progresses. Both sides are expected to work hard to meet existing deadlines and should not anticipate any extensions. The stay does not relieve either side of its duty under Rule 26 to supply initial disclosures, even as to the amended counterclaim.

CONCLUSION

For the foregoing reasons, Saphena's motion for leave to file an amended counterclaim is **GRANTED IN PART** and **DENIED IN PART**. Maquet's motion to stay, sever, or bifurcate is **GRANTED IN PART** and **DENIED IN PART**. Saphena shall file an amended counterclaim consistent with this order by **AUGUST 3 AT NOON**, but all discovery and other proceedings as to the amended counterclaim are **STAYED** until further order of the Court.

IT IS SO ORDERED.

Dated: July 27, 2017.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE