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5 UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
7 OAKLAND DIVISION

8 ATHENA FEMININE TECHNOLOGIES  
9 INC.,

10 Plaintiff,

11 vs.

12 DEREK WILKES, PELFIT  
13 TECHNOLOGIES, LLC, MORTON  
14 CORDELL, SILK ROAD ASSOCIATES,  
LLC, SIMON FAN and KING CHAMPION  
(HONG KONG) LTD.,

15 Defendants.  
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Case No: C 10-4868 SBA

**ORDER DENYING PLAINTIFF'S  
MOTION FOR LEAVE TO FILE A  
SUPPLEMENTAL AND AMENDED  
COMPLAINT**

Dkt. 138

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18 The parties are presently before the Court on Plaintiff's Motion for Leave to File a  
19 Supplemental and Amended Complaint. Dkt. 138. Having read and considered the papers  
20 filed in connection with this matter and being fully informed, the Court hereby DENIES the  
21 motion for the reasons set forth below.<sup>1</sup>

22 **I. BACKGROUND**

23 **A. SUMMARY OF PRIOR PROCEEDINGS**

24 The parties are familiar with the facts of this overlitigated case which are  
25 summarized herein only to extent they are relevant to instant motion.  
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27 <sup>1</sup> The Court, in its discretion, finds this matter suitable for resolution without oral  
28 argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b). The motion hearing  
scheduled for February 19, 2013, is VACATED.

1 Plaintiff Athena Feminine Technologies, Inc. (“Plaintiff” or “Athena”) is the  
2 developer and owner of the Pelvic Muscle Trainer (“PMT”), a patented wireless electrical  
3 stimulation product developed to treat and prevent female incontinence. According to  
4 Plaintiff, two of its former consultants, Derek Wilkes (“Wilkes”) and Morton Cordell  
5 (“Cordell”), utilized confidential information obtained from Plaintiff under a  
6 Confidentiality Agreement to develop an unauthorized, allegedly “derivative” product  
7 known as the Personal Exerciser (“PEX”). Plaintiff thus alleges that it owns the rights to  
8 the PEX.

9 Athena filed its original Complaint in this Court on October 27, 2010, a First  
10 Amended Complaint on January 27, 2011, and a Second Amended Complaint (“SAC”) on  
11 September 26, 2011. Dkt. 1, 34, 69. As Defendants, the SAC names: (1) Wilkes; (2) Pelfit  
12 Technologies LLC (“Pelfit”), which is owned by Wilkes; (3) Cordell; (4) Silk Road  
13 Associates LLC (“SRA”), which is owned by Cordell; (5) King Champion (Hong Kong)  
14 Ltd. (“King Champion”), the entity which manufactured the PMT; and (6) Simon Fan  
15 (“Fan”), the owner of King Champion.

16 The SAC alleges seven claims for relief, as follows: (1) Direct Patent Infringement  
17 (against Pelfit); (2) Inducing Patent Infringement (against Wilkes, Fan and Cordell);  
18 (3) Misappropriation of Trade Secrets (against all Defendants); (4) Breach of Contract  
19 (against Wilkes, SRA and King Champion); (5) Inducing Breach of Contract (against  
20 Wilkes and Cordell); (6) Intentional Interference with Business Relations and Economic  
21 Advantage (against Wilkes and Cordell); (7) Unfair Competition (against all Defendants);  
22 and (8) Declaratory Relief (against all Defendants).<sup>2</sup> A trial is scheduled in this matter for  
23 September 9, 2013. Dkt. 132 at 6. Fact discovery closes on May 14, 2013. Id. at 1.<sup>3</sup>  
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26 <sup>2</sup> King and Fan settled with Plaintiff and have been dismissed from the action. Dkt.  
27 109. The Court previously ordered Plaintiff to arbitrate its dispute with SRA. Dkt. 68.

28 <sup>3</sup> Plaintiff has conducted no formal discovery since filing this action over two years  
ago.

1           **B.       THE INSTANT MOTION**

2           On January 8, 2013, Plaintiff filed the instant motion for leave to file a supplemental  
3 and amended complaint under Federal Rule of Civil Procedure 15(a)(2) and (d). Dkt. 138.  
4 Plaintiff alleges that “[d]uring the course of settlement discussions in 2012,” it learned that  
5 Wilkes and Cordell “had now developed and were planning to bring to market, a ‘next  
6 generation’ product or products which Plaintiff also believes to be derivative of the  
7 Confidential Information provided to these defendants when they were plaintiff’s  
8 consultants[.]” Mot. at 2. Based on that alleged disclosure, Plaintiff proposes to  
9 supplement its causes of action for misappropriation of trade secrets, breach of contract and  
10 declaratory relief, with allegations that Wilkes, Pelfit and Cordell have developed and  
11 marketed “next generation products” that are “derivative of Confidential Information  
12 provided by plaintiff Athena” and “derivative of the PEX[.]” Finley Decl. Ex. A ¶¶ 42, 43;  
13 see also id. ¶¶ 65, 67, 69, 71, 72, 75, 76, 94, 95 (“Proposed Supp. and Am. Compl.”).  
14 Defendants oppose the motion. The matter has been fully briefed and is ripe for  
15 adjudication.

16           **II.       LEGAL STANDARD**

17           Under Federal Rule of Civil Procedure 15(d), a district court may allow a party to  
18 supplement his or her complaint in order to set out “any transaction, occurrence, or event  
19 that happened after the date of the pleading to be supplemented.” Fed. R. Civ. P. 15(d).  
20 “The purpose of Rule 15(d) is to promote as complete an adjudication of the dispute  
21 between the parties as possible by allowing the addition of claims which arise after the  
22 initial pleadings are filed.” William Inglis & Sons Baking Co. v. ITT Cont’l Baking Co.,  
23 668 F.2d 1014, 1057 (9th Cir. 1982).

24           The legal standard for granting or denying a motion to supplement under Rule 15(d)  
25 is the same as the standard for granting or denying a motion under Rule 15(a). Paralyzed  
26 Veterans of America v. McPherson, No. C 06-4670 SBA, 2008 WL 4183981, at \*25 (N.D.  
27 Cal. Sept. 9, 2008) (Armstrong, J.). The factors germane to a motion to amend are: bad  
28 faith, undue delay, prejudice to the opposing party, and futility of amendment.” Ditto v.

1 McCurdy, 510 F.3d 1070, 1079 (9th Cir. 2007). The district court has “broad discretion” in  
2 ruling on a Rule 15(d) motion. Keith v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988).<sup>4</sup>

### 3 **III. DISCUSSION**

4 Plaintiff seeks to supplement its claims for misappropriation of trade secrets, breach  
5 of contract and declaratory relief. A claim for misappropriation of trade secrets “requires  
6 the plaintiff to demonstrate: (1) the plaintiff owned a trade secret, (2) the defendant  
7 acquired, disclosed, or used the plaintiff’s trade secret through improper means, and (3) the  
8 defendant’s actions damaged the plaintiff.” CytoDyn of New Mexico, Inc. v. Amerimmune  
9 Pharms., Inc., 160 Cal.App.4th 288, 297 (2008) (internal quotations and citation omitted).

10 A claim for breach of contract requires a plaintiff to show the: “(1) existence of the  
11 contract; (2) plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach;  
12 and (4) damages to plaintiff as a result of the breach.” CDF Firefighters v. Maldonado, 158  
13 Cal.App.4th 1226, 1239 (2008). A claim for declaratory relief requires an actual  
14 controversy. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342, (2006).

15 Defendants contend the Court should disallow the proposed amendments on the  
16 grounds of futility. “Whether an amendment is ‘futile’ is measured by the same standards  
17 that govern a motion to dismiss.” Hofstetter v. Chase Home Finance, LLC, 751 F. Supp. 2d  
18 1116, 1123 (N.D. Cal. 2010). A proposed claim is not “futile” if, taking all well-pleaded  
19 factual allegations as true, it contains enough facts to “state a claim to relief that is plausible  
20 on its face.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v.  
21 Twombly, 550 U.S. 544, 570 929 (2007)). The allegations must be “sufficiently detailed to  
22 give fair notice to the opposing party of the nature of the claim so that the party may  
23 effectively defend against it.” Starr v. Baca, 633 F.3d 1191, 1204 (9th Cir. 2011). A court  
24 is not required “to accept as true allegations that are merely conclusory, unwarranted  
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27 <sup>4</sup> Plaintiff also predicates its motion on Rule 15(a)(2), which authorizes the filing of  
28 an *amended complaint*, as opposed to filing a *supplemental* pleading. This distinction is  
inapposite, however, as a court’s discretion in connection with motions brought under Rule  
15(a)(2) and 15(d) is governed by the same set of factors.

1 deductions of fact, or unreasonable inferences.” In re Gilead Sciences Securities Litig., 536  
2 F.3d 1049, 1055 (9th Cir. 2008).

3         The crux of Plaintiff new allegations is that Wilkes and Cordell are engaged in the  
4 design, development, production and marketing of “next generation products,” which are  
5 “derivative of Confidential Information provided [to them] by Plaintiff Athena . . . and are  
6 derivative of the PEX product which is the sole property of Athena.” Proposed Supp. and  
7 Am. Compl. ¶ 42. These proposed amendments are too vague and conclusory to support  
8 plausible claims for misappropriation of trade secrets, breach of contract or declaratory  
9 relief. In particular, Plaintiff fails to identify *what* particular products constitute “next  
10 generation products” or *when* these products allegedly were manufactured and distributed.  
11 The absence of such information deprives Defendants of fair notice of the claims being  
12 asserted against them. Nor is there any factual showing that the purported “next generation  
13 products” are actually *derived from* Plaintiff’s confidential information or the PEX. The  
14 absence of such facts is fatal to Plaintiff’s claim that Defendants misappropriated trade  
15 secrets or breached the Confidential Agreement, or that an actual controversy exists  
16 regarding the “next generation products.”

17         The Court further finds that permitting amendment at this late stage of the litigation  
18 would be unduly prejudicial to Defendants. See Eminence Capital, LLC v. Aspeon, Inc.,  
19 316 F.3d 1048, 1052 (9th Cir. 2003) (noting that prejudice “carries the greatest weight” in  
20 assessing whether to allow amended pleadings). This case has been pending for over two  
21 years and discovery will close shortly on May 14, 2013. Allowing Plaintiff to state new  
22 claims at this juncture undoubtedly would necessitate an enlargement of the discovery cut-  
23 off date, which, in turn, will delay trial. This weighs against permitting the proposed  
24 supplementation. See Solomon v. N. Am. Life and Cas. Ins. Co., 151 F.3d 1132 (9th Cir.  
25 1998) (holding that district court properly exercised its discretion in denying leave to  
26 amend under Rule 15 where the amendment “would have required re-opening discovery,  
27 thus delaying proceedings”). Moreover, there is no reason that Plaintiff could not have  
28 included these allegations in its prior pleadings. The fact that Plaintiff chose not to conduct

1 any discovery since the commencement of this case on October 27, 2010, and, as a result,  
2 only recently learned of the alleged “next generation products,” is attributable to Plaintiff’s  
3 dilatory conduct. See Jackson v. Bank of Hawaii, 902 F.2d 1385, 1388 (9th Cir. 1990)  
4 (“Relevant to evaluating delay is whether the moving party knew or should have known the  
5 facts and theories raised by the amendment in the original pleading.”).

6 **IV. CONCLUSION**

7 In sum, the considerations relevant to a motion to supplement under Rule 15(d)  
8 counsel the Court to exercise its discretion against permitting Plaintiff to supplement its  
9 pleadings. Accordingly,

10 IT IS HEREBY ORDERED THAT:

11 1. Plaintiff’s Motion for Leave to File a Supplemental and Amended Complaint  
12 is DENIED.

13 2. This Order terminates Docket 138.

14 IT IS SO ORDERED.

15 Dated: February 5, 2013

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17 SAUNDRA BROWN ARMSTRONG  
18 United States District Judge  
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