UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JENS ERIK SORENSEN, as Trustee of SORENSON RESEARCH AND DEVELOPMENT TRUST,

Plaintiff,

v.

DMS HOLDINGS, INC dba MABIS HEALTHCARE and DURO-MED INDUSTRIES, a Delaware Corporation; and DOES 1-100,

Defendants.

Case No. 08cv559-BTM-CAB

ORDER RE MOTION FOR RECONSIDERATION OF ORDER RE MOTION FOR EXCEPTION TO STAY TO NAME AND SERVE DOE 1

Plaintiff moves for reconsideration of the Court's November 24, 2010 Order denying Plaintiff's motion for leave to add Becton Dickinson as a Defendant in this case [dock. #101] on the ground that the Court failed to address how denial of this motion would prejudice Plaintiff. Plaintiff asserts that that Order will result in a loss of two and a half years of potential damages because damages for patent infringement are limited to six years from the date a lawsuit is filed. *See* 35 U.S.C. § 286.

The Court was aware of Plaintiff's argument that he would be prejudiced if he could not join Becton Dickinson when the Court issued the November 24, 2010 Order. Because the Court concluded that Plaintiff was unable to meet Fed. R. Civ. P. 20(a)(2)'s requirements governing joinder, it was not necessary to address Plaintiff's argument regarding prejudice. Then, as now, Plaintiff presents no authority as to why a showing of prejudice would allow

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a party to skirt the mandatory requirements of Rule 20(a)(2).

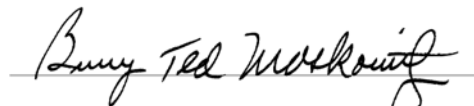
Regardless, the Court finds that any prejudice caused by the Order denying joinder is of Plaintiff's own making. Plaintiff's counsel should have been aware that the BD Thermometer was a product sold by Becton Dickinson since August 30, 2006. [*See* dock. # 79, Exhibit 1, dock # 75, Exhibit A; *see also* dock. # 79 at 4-6] Indeed, Plaintiff's original motion to join Becton Dickinson as a Defendant included as an exhibit a September 15, 2006 letter from Actherm to Sorensen that states, "I have now been engaged to respond behalf of Acterm's customer, BD, concerning Sorensen Research & Development Trust's allegations of patent infringement as set forth in your August 30, 2006 letter to BD." [Dock. #75, Exh. A] As Defendants correctly observe, "[H]ad Plaintiff wanted to recover the whole of its alleged damages from Becton Dickinson, Plaintiff could easily have named Becton Dickinson in a separate suit at least as early as August 30, 2006." (Opp. at 4)

Plaintiff's reply does not address this deficiency in his claim of prejudice. Instead, for the first time in his reply brief on the motion for reconsideration, Plaintiff argues that Defendant DMS does not have standing to object to another Defendant being named in this case. (Reply at 4) The Court will not consider this argument. *See Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam) ("Issues raised for the first time in the reply brief are waived.").

Plaintiff's motion for reconsideration is **DENIED**. To the extent Plaintiff seeks a lift of stay, this request is also **DENIED**.

IT IS SO ORDERED.

DATED: March 14, 2011



Honorable Barry Ted Moskowitz
United States District Judge