

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

AT ENGINE CONTROLS LTD.,	:	3:10-CV-01539-VLB
Plaintiff,	:	
	:	
vs.	:	
	:	
GOODRICH CORPORATION and	:	
GOODRICH PUMP & ENGINE	:	
CONTROL SYSTEMS, INC.,	:	
Defendants.	:	APRIL 24, 2013

**RECOMMENDED RULING RE: PLAINTIFF’S DEMAND FOR DISCOVERY
OF DOCUMENTS PERTAINING TO EMC-101 AND EMC-102 AND
PLAINTIFF’S MOTION TO AMEND COMPLAINT**

I. Introduction

The plaintiff, AT Engine Controls, Ltd. (“ATEC”) seeks discovery pertaining to the EMC-101 and EMC-102. The defendants, Goodrich Corporation (“Goodrich”) and Goodrich Pump & Engine Control Systems, Inc. (“GPECS”) objected, in part, on the basis that the EMC-101 and EMC-102 are beyond the scope of the pending Amended Complaint dated November 5, 2010. The plaintiff responded with a motion, dated March 4, 2013, to amend its Complaint to include, *inter alia*, express allegations pertaining to the EMC-101 and EMC-102. On March 15, 2013, the Court referred this dispute to the undersigned Special Master. (Dkt. No. 132.) After a hearing on this and other disputes was held, ATEC submitted a letter brief (with exhibits) in support of its motion. GPECS and Goodrich responded on March 29, 2013 with briefs (and exhibits) opposing the motion. ATEC submitted its reply brief on April 3, 2013.

II. Is Discovery Pertaining to the EMC-101 AND EMC-102 Within the Scope of the Pending Complaint?

ATEC's pending Amended Complaint, dated November 5, 2010, alleged in material part:

7. "This action arises out of Goodrich and GPECS' misappropriation and misuse of AT Engine's confidential and proprietary information concerning its technology, which Goodrich and GPECS have used to develop a competing product that it sells as a direct replacement for the product developed, marketed and sold by AT Engine. . . ."

8. "AT Engine . . . develops and manufactures, *inter alia*, a digital electronic control unit ("DECU") for the T55 helicopter engine manufactured by Honeywell International, Inc."

14. "In turn, Honeywell has historically sold the completed T55 helicopter engines to Boeing, which incorporates them into CH-47D Chinook helicopters"

21. "In 2001, the Army engaged Goodrich and/or GPECS to develop a Universal Governor ("ECU"), initially aimed at a platform which later became redundant. The unit was then designated to be used on the next generation of Chinook helicopters, the CH-47F. . . ."

23. ". . . it is clear that the ECU replicates ATEC's proprietary technology and trade secrets"

47. "Goodrich and GPECS . . . conspired to misappropriate AT Engine's trade secrets to their own use in order to develop, manufacture, produce and market competing products and services, including, but not limited to, the ECU."

48. ". . . Goodrich and GPECS knowingly disclosed and used AT Engine's trade secrets to develop the ECU and other products and services"

The phrase "Universal Governor" and "ECU" are not more specifically defined in the Complaint nor do the allegations expressly exclude the EMC-101 or the EMC-

102. Nevertheless, throughout the course of the litigation, the plaintiff has itself interpreted the phrase ECU as being the EMC-100. In the parties' Joint Report of Rule 26(f) Planning Meeting dated January 21, 2011, the plaintiff affirmed that:

AT Engine alleges that beginning in approximately 2001, Goodrich and/or GPECS developed a Universal Governor ("ECU") which is, in essence, a replica of the DECU containing near-identical elements and is designed as a full replacement of the DECU.

(Dkt. No. 31 at 4.)

The defendants aver – without opposition – that it is the EMC-100 that is a drop-in replacement for the DECU. The EMC-101 and EMC-102 are not; and they consist of substantially different components and functions. (See Dep. of Patterson Sisson, July 3, 2012 at 79-82, 146-49, 155-56; Dep. of Louis Pannullo, Dec. 13, 2012 at 28-29, 81-82.)

In its subpoena to Honeywell International, Inc., ATEC stated:

The term "ECU" refers to the electronic control unit developed by Goodrich for use in the T55 helicopter engine used in Chinook helicopters. (See Subpoena to Honeywell International, Inc. at 2, attached to Opposition as Ex. A.)

This statement is consistent with the allegations in the Complaint that tie the disputed ECU to the Chinook helicopters. It is undisputed that the EMC-100 is the ECU that is used in the Chinook helicopters. Neither the EMC-101 nor the EMC-102 are used in Chinook helicopters. The EMC-101 is produced by Hindustan Aeronautics Ltd. and used in various Turbomeca applications, such as the Arrius and Arriel engines. The EMC-102 is used in Black Hawk helicopters.

Similarly, the focus of all of the parties in their discovery efforts to date has been on the EMC-100, including GPECS' production of some two million documents and various depositions. Indeed, the plaintiffs argue in their pending motion that it was not until December, 2012 that it had reason to believe that the EMC-101 and the EMC-102 were designed using ATEC's proprietary technology.

ATEC argues that based on the breadth of the allegations of its pending Complaint, it is now entitled to the production of all of the design, technical, sales and profit documents relating to both the EMC-101 and EMC-102 product lines. If its review of those documents is not conclusive, ATEC will then presumably demand depositions of witnesses regarding those products. The defendants assert that they have already produced some two million documents pertaining to the EMC-100 product line and produced several witnesses for depositions. If the plaintiff is entitled to comparable discovery pertaining to the EMC-101 and EMC-102, the defendants will have the burden of a comparable response.

This case has been pending since September, 2010. Under the current Scheduling Order, fact discovery is to be completed by July, 2013. It was not until December, 2012 that the plaintiff sought any discovery pertaining to the EMC-101 and EMC-102, in part because it believed – as did the defendants – that the Complaint was limited to the EMC-100. Under these circumstances, the plaintiff's demands to compel discovery regarding the EMC-101 and 102, based on the allegations of the pending Complaint, are denied.

III. Plaintiff's Motion to Amend the Complaint

By motion dated March 4, 2013, ATEC seeks to amend its pending Complaint in a manner which would, according to the motion: “(1) include new – and recently discovered – allegations relating to additional electronic controllers, the EMC-101 and EMC-102; (2) drop the contractual claims against the defendant Goodrich Corporation; (3) include additional factual information to clarify the existing allegations of the Complaint; and (4) make technical edits and correct typographical errors.” Both Goodrich and GPECS object to the motion. They apparently do not object to the deletion of the contractual claims and to typographical corrections, but they do object to new allegations regarding the EMC-101 and EMC-102 and to the addition of new tort claims against Goodrich.

A. Governing Rule

The first issue to be resolved is the standard by which the motion should be considered. ATEC bases its motion on Rule 15(a)(2) of the Federal Rules of Civil Procedure, which provides, in part: “The court should freely give leave [to amend a pleading] when justice so requires.” ATEC further cites to applicable Second Circuit authority for the proposition that amendments should be granted liberally, absent undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by prior amendments, or undue prejudice to opposing parties.

The defendants assert that the governing rule is Rule 16(b) of the Federal Rules of Civil Procedure, which applies when a party seeks to modify a scheduling order issued by the court. Rule 16(b)(4) provides that: “A schedule may be modified only

for good cause and with the judge's consent." The defendants assert that the Complaint cannot be amended without modifying the Scheduling Order and that the plaintiff has failed to meet the "good cause" standard imposed by Rule 16(b)(4).

The parties, in their initial Rule 26(f) Report of Parties' Planning Meeting, proposed that motions to amend be filed by March 22, 2011, which was 60 days after they filed their Rule 26(f) Report. (Dkt. No. 31.) On May 23, 2011, the Court (Chatigny, J) issued its Scheduling Order Regarding Case Management Plan which provided: "Any motion to amend or join parties filed after these dates will be governed by the good cause standard of Fed. R. Civ. P. 16(b)." (Dkt. No. 42.) The Standing Order on Pretrial Deadlines of the Court (Bryant, J.) reiterates the applicability of this standard:

(e) In accordance with Fed. R. Civ. P. 16(b), parties may file motions for modification of the dates set forth in the scheduling order issued pursuant to the parties' 26(f) report . . . Motions to modify will not be granted absent good cause shown in the motion. This standard requires a particularized showing that the scheduling order could not be complied with despite due diligence of the party seeking modification.

The plaintiff argues that the issue of the Amended Complaint was raised in the Joint Status Report of Counsel filed on February 19, 2013 (Dkt. No. 124), which provides at paragraph 5: "Plaintiff states that it intends to file an amended complaint. Defendant GPECS indicated that it will oppose the amended complaint." The parties further stated in paragraph 1: "GPECS contends (and ATEC disputes) that the foregoing dates may need to be adjusted if ATEC's motion to amend the complaint is granted." The plaintiff further argues that because the revised Scheduling Order

issued on February 22, 2013 (Dkt. No. 128) does not set any deadline for the amendment of pleadings, the plaintiff's motion to amend is not contrary to the deadlines imposed by a Scheduling Order. Therefore, the plaintiff contends, there is no basis for imposing the standard set by Rule 16(b).

The undersigned Special Master disagrees with the plaintiff. The deadline for the amendment of the Complaint passed over two years ago. The Court (Chatigny, J. and Bryant, J.) issued clear orders that any motion to amend beyond the stated deadline must meet the "good cause" standard imposed by Rule 16(b). Although the parties, in their recent status report, raised the possibility of an opposed motion to amend being filed in the future, they did not seek nor did the Court consider a motion to amend the pleadings at that time. Since that matter was not before the Court when the revised Scheduling Order was issued on February 22, 2013, it cannot reasonably be concluded that an extended date for the filing of such a motion was implicitly reset *sub silentio*.

Consequently, the issue to now be considered is whether the plaintiff's motion to amend establishes the "good cause" required by Rule 16(b).

B. "Good Cause" Analysis

This Court has recently stated:

At a minimum, good cause requires a showing by the moving party of an objectively sufficient reason for extending a deadline such that the deadlines cannot reasonably be met despite the diligence of the party needing the extension. The inquiry focuses on the moving party's reason for requesting the extension . . . The Second Circuit has emphasized that 'the primary

consideration' in determining whether good cause has been shown 'is whether the moving party can demonstrate diligence.'

Odom v Matteo, 772 F.Supp. 2d 377, 405 (D. Conn. 2011) (citations omitted.)

Various unique circumstances in this case complicate the diligence analysis. The production of documents by GPECS to ATEC has been substantially impacted by the U.S. State Department's International Traffic in Arms Regulations ("ITAR"), to the extent that virtually all of the two million pages of documents produced thus far by GPECS have been designated as "ITAR-Regulated". Although those documents were accessible by plaintiff's counsel, they could not be reviewed by plaintiff's representatives until after they had obtained an appropriate State Department license and registration. Plaintiff asserts that that license was not obtained until February, 2013. The production and review of documents was further complicated by the transitions of counsel for both GPECS and ATEC and the divestiture of GPECS by Goodrich. It should also be noted that at the outset of this case, counsel for the parties opted to forego the traditional means of discovery provided in Rule 26 in favor of more general understandings regarding the production of relevant documents and information. Consequently, there are no traditional interrogatories and responses by which one can more readily measure the diligence of the discovery efforts.

C. Amendments Pertaining to the EMC-101 and EMC-102

There is a dispute over when the plaintiff knew or should have known about the functionalities and components of the EMC-101 and the EMC-102. The plaintiff contends that it was not until the depositions of GPECS employees in December, 2012

that it first discovered that the EMC-101 and EMC-102 had been developed “using design elements contained in the EMC-100, which itself was designed using ATEC’s proprietary technology.” (ATEC’s Motion to Amend, March 4, 2013, at 3). ATEC has attached to its motion excerpts from the depositions of two GPECS employees, Mr. Louis Pannullo and Mr. Raymond Perra. Although those excerpts indicate that the EMC-100, EMC-101 and EMC-102 share a common “computer system architecture”, they do not appear to support a claim that the specific components of that architecture were based on ATEC’s technology.

GPECS strenuously denies not only that its EMC-101 and EMC-102 products are based in any way upon ATEC technology, but it further denies ATEC’s claim that it first learned about these products in December, 2012. GPECS presented exhibits demonstrating that GPECS had publicly disclosed the existence of these products since 2006 and had publicly advertised the functionalities of the EMC-102 since 2009. GPECS also presented exhibits revealing that ATEC executives were at least generally familiar with these products in 2009. GPECS further produced excerpts from the deposition of Mr. Sisson, the GPECS System & Software Team Leader, in which ATEC’s counsel questioned the witness about the EMC-101 and EMC-102 and their relationship to the EMC-100. For example:

Q. And has Goodrich been successful in using the EMC-100 on other helicopter engines?

A. There’s been an EMC-101 and EMC-102. They’re used on other helicopter engines.

* * *

Q. . . . does the EMC-102 have a different hardware configuration than the EMC-100?

A. The process -- the same three processors are used, but other than that, the hardware configuration is quite a bit different.

* * *

Q. Is the EMC-102 and 101 a drop-in replacement?

A. The 102 is a drop-in replacement, as I understand it

(Dep. of Patterson Sisson at 79, 155-56.) This deposition was taken in July, 2012.

ATEC replied by admitting that it had been aware that the defendants had manufactured other products, including other electronic control devices, but denying that prior to the December, 2012 depositions it knew that the devices shared some common elements, specifically including the “computer system architecture”.

D. Analysis and Conclusions

Although the unique complications of this case, referred to above, have understandably impeded the plaintiff’s discovery efforts, it cannot be said that those complications were caused by the defendants. Furthermore, the plaintiff’s motion does not establish a clear linkage between those complications and any discovery efforts relating to the EMC-101 and EMC-102. Indeed, GPECS has established, and the plaintiff has not denied, that it was well aware of those products and their essential functionalities before this lawsuit was filed. In earlier discovery during July, 2012, ATEC’s counsel had obtained additional information through a deposition of a GPECS official regarding component similarities between the products. The information obtained in the July, 2012 deposition is not so materially different from

the information it obtained in the December, 2012 deposition. Although the plaintiff's position regarding its diligence is not devoid of merit, it has failed to meet its burden as imposed by Rule 16(b).

To permit the amendment would also cause considerable prejudice to the defendants. If claims regarding the EMC-101 and the EMC-102 were injected into this case at this late date, it could justify the plaintiff's demands for the production of all of the technical, marketing, sales and profit documents relating to those products. GPECS argues that the universe of responsive documents could equal the two million pages of documents produced in response to comparable discovery demands relating to the EMC-100. The resources required to produce such documents and to respond to the corresponding depositions would obviously be significant, as would be the modifications of the Scheduling Order (including a delay of the trial) that would be necessary in order to accommodate such discovery efforts.

For the reasons set forth, the undersigned Special Master recommends the denial of the motion to amend the plaintiff's Complaint.

IV. Plaintiff's Proposed Count Nine: Goodrich's Tortious Interference with ATEC's Contractual Relationship and Business Expectancies with GPECS

Goodrich objects to ATEC's effort to add a new count that alleges that Goodrich tortiously interfered with ATEC's relationship with GPECS as defined in a 1984 Marketing Agreement and the purchase orders issued thereunder. Goodrich contends that this is an entirely new claim; that there have previously been no allegations pertaining to a 1984 agreement; and that ATEC provides no justification

for asserting this entirely new claim at this late time in the case. It further contends that it will be prejudiced by this new claim because it will necessarily delay a resolution of the case.

ATEC does not specifically address the basis for the tortious interference claim in its motion. Under the heading: *Making Technical Edits and Correcting Typographical Errors*, ATEC states simply that it “has further delineated its contract claims based on the 1979 Marketing Agreement and the 1984 T-55 Program Agreement and related purchase orders.” In its Reply, ATEC responds to the Objection by stating: “In taking discovery of GPECS, ATEC discovered information related to Goodrich’s tortious interference with ATEC’s contract with GPECS” (Reply at 9.) In neither its Motion nor in its Reply does ATEC establish what the information is, when it was discovered, how it relates to tortious interference or why ATEC was prevented from asserting the claim earlier.

Consequently, ATEC has failed to meet its burden of establishing good cause, as specified in Rule 16(b), and the undersigned recommends that the Motion be denied with respect to Proposed Count Nine.

V. **Plaintiff’s Proposed Amendments Asserting Breaches of a 1984 Agreement and Violations of the Uniform Commercial Code**

Although not specifically identified in the plaintiff’s motion to amend, a comparison of the proposed complaint with the pending complaint indicates that the plaintiff proposes to add (at least) paragraphs 13-16 and 19-21 which refer to a 1984 Agreement between GPECS and ATEC and to add counts 2-4, which allege breaches

of the 1984 Agreement and violations of the provisions of the Uniform Commercial Code (“U.C.C.”). These proposed amendments are apparently what the plaintiff referred to in its motion as being “additional factual information to clarify the existing allegations of the Complaint.” (Plaintiff’s Motion to Amend, March 4, 2013, at 1, 7.)

Both defendants object to these proposed amendments on the ground that there is no good cause to justify the injection of the 1984 Agreement or the new causes of action at this late date in the litigation. They contend that the 1984 Agreement has been known to ATEC since at least 1984 and to ATEC’s counsel since, at the very latest, December 28, 2010, when the defendants referred to the Agreement in their Affirmative Defenses. (Answer, Dec. 28, 2010 at 8.) The Agreement has also been produced in discovery and marked as an exhibit in depositions. GPECS further argues that the proposed new causes of action based on the U.C.C. are futile as being time barred under both the four year statute of limitations imposed by the U.C.C. and by the six year statute of limitation imposed upon general contract claims. Both defendants further object on the ground that they will be prejudiced by the assertion of new claims toward the end of the discovery period.

In its reply, ATEC responds that the new causes of action are not time-barred because they relate back to September 28, 2010, which is the date of the original pleading, and they thus incorporate references to the same conduct giving rise to the new claims. ATEC further responds that the defendants will not be prejudiced because there is no indication that the defense or discovery related to the new claims will necessarily delay resolution of the case.

Since the plaintiff's motion falls within the ambit of Rule 16(b) of the Federal Rules of Civil Procedure, as discussed above, the plaintiff has the burden of establishing in its motion good cause for the late amendment. It is obvious that the plaintiff has been aware of the Agreement for several years. Since ATEC now argues that the conduct giving rise to the new claims is the same conduct giving rise to the contract claims in the original pleading, it is equally obvious that it has been aware of that conduct for several years. What is missing in the plaintiff's motion and in its reply is any good cause for the delay in filing these claims.

Consequently, the undersigned recommends that the motion to add these facts and claims be denied.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "James K. Robertson, Jr.", is positioned above the typed name and contact information.

James K. Robertson, Jr.
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Dated at Waterbury, Connecticut: April 24th, 2013.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2013 this document was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

A handwritten signature in blue ink, appearing to read "James K. Robertson, Jr.", is positioned above a horizontal line.

James K. Robertson, Jr.