IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

AMGEN INC., et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 15-839-RGA
	:	
HOSPIRA, INC.,	:	
	:	
Defendant.	:	

ORDER

Plaintiff has filed a motion for leave to file a second amended complaint. (D.I. 73). The deadline for motions "to join other parties, and to amend or supplement the pleadings" was August 15, 2016. (D.I. 37, ¶ 2). The parties together had proposed this date. (D.I. 30, ¶ 2). The motion was timely filed on August 15, 2016. Thus, leave should be "freely give[n] when justice so requires." Fed. R. Civ. P. 15(a)(2).

The proposed amended pleading adds no new patents, but does add two new theories of infringement against the existing Defendant, and would add three new defendants, two of which are German companies located (not surprisingly) in Germany. (D.I. 74-1, ¶¶ 7-10, 29-30; *see* D.I. 88, pp. 7-8; D.I. 112, pp. 5-6 (contesting whether the theories are new)).

Defendant objects, arguing that the proposed amended complaint was unduly delayed, would prejudice Defendant, and would be futile.

Plaintiff responds that the delay was not unreasonable, because Plaintiff did not appreciate the need to add the three additional defendants until recently. Despite certainly knowing about the additional defendants since the beginning of the case, I think Plaintiff's

explanation is plausible. There is no particular reason to require Plaintiff to shoot first and to ask questions later. Instead, Plaintiff asked questions, and then decided to shoot. I think that is reasonable, and sufficient explanation for the delay.

On the prejudice point, Defendant has a better argument. I think it is fair to expect that if amendment were granted, the current trial date of September 18, 2017, would be lost. Three separate companies, two of whom are foreign, would be in the litigation. It would be unreasonable to expect the three of them to be ready for trial a year from now. There is back-and-forth about "at-risk launch," which I do not think I can definitively resolve at this point. Nevertheless, since the two asserted patents are expired, and Defendant has not yet launched, I am not sure why this litigation exists unless Plaintiff has a theory that there is some relief it can obtain down the road that will hinder Defendant's entry into the market. (*See* D.I. 74-1, Prayer for Relief). Therefore, I think an amendment that causes delay does prejudice Defendant. It seems to me that the principal cause of delay would come from adding three new defendants, and not from adding two "new" theories. It appears to me that the two "new" theories are based mostly on the same facts that would already have been the subject of discovery.

On the futility point, the Counts that are significantly amended, or are new, as to Defendant, are counts four (amended) and five (new). I think they sufficiently state a claim upon which relief could be granted.

WHEREFORE, this 3 day of October 2016, Plaintiff's Motion (D.I. 73) is **GRANTED-IN-PART** and **DENIED-IN-PART**. Plaintiff is granted leave to file an amended complaint substantially in the form proposed (D.I. 74-1), but only as against Defendant.[1]

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[1] Of course, nothing in this Order purports to express any opinion on the possibility of Plaintiff filing any separate litigation against the other three proposed defendants.

Plaintiff is to file the amended complaint within two days of this Order. The parties are directed to meet-and-confer promptly about any modifications to the schedule that may be needed if there is any legitimate need for further discovery. Said modifications shall not include changing the pretrial and trial dates. The parties shall file a joint status report, including a proposed scheduling order should there need to be any modifications to the existing schedule, no later than eight business days from the date of this Order.

IT IS SO ORDERED.

Richard G. Andrews
United States District Judge