

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 4094

UNITED THERAPEUTICS
CORPORATION,

Plaintiff,

v.

LIQUIDIA TECHNOLOGIES, INC.
and ROBERT ROSCIGNO,

Defendants.

**ORDER ON PLAINTIFF'S MOTION
TO AMEND**

1. **THIS MATTER** is before the Court on Plaintiff United Therapeutics Corporation's ("UTC") Motion to Amend Complaint (the "Motion") pursuant to Rule 15 of the North Carolina Rules of Civil Procedure ("Rule(s)"), (ECF No. 80).

2. UTC seeks leave to amend its First Amended Complaint, (ECF No. 15). Among other things, the extensive proposed amendments would: (1) add as parties a subsidiary of UTC and the parent and an affiliate of Liquidia Technologies, Inc. ("Liquidia"); (2) expand the facts to include, among other things, allegations concerning documents obtained in discovery that UTC alleges contain both trade secret information and further details about Defendants' alleged misappropriation; (3) expand an existing claim against Liquidia for violation of the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"); (4) assert new claims and add corresponding demands for relief against Robert Roscigno ("Roscigno"); (5) add a claim for declaratory judgment regarding Roscigno's employment agreements with

UTC and Lung Rx; and (6) add a demand for a jury trial. (*See generally* Mot. Amend Compl. Ex. A [“Proposed Second Amended Complaint”], ECF No. 80.1.)

3. Defendants object to (1) UTC’s proposal to name new parties; (2) UTC’s proposed allegations from documents produced in discovery that allegedly contain misappropriated trade secrets; and (3) UTC’s proposed new causes of action and demands for relief. (*See generally* Defs.’ Br. Opp. Mot. Amend Compl. [“Defs.’ Br.”], ECF No. 86.)

4. Having considered the Motion, the related briefs, and the arguments of counsel at a hearing on the Motion, the Motion is GRANTED in part and DENIED in part.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jim W. Phillips, Jr., Eric M. David, and Kasi W. Robinson; McDermott Will & Emery, LLP, by Douglas H. Carsten; and Goodwin Procter, LLP, by William Jackson, for Plaintiff United Therapeutics Corporation.

Parker Poe Adams & Bernstein LLP, by Stephen V. Carey and Corri A. Hopkins; and Cooley, LLP, by Sanya Sukduang, and Jonathan Davies, for Defendant Liquidia Technologies, Inc.

McGuireWoods, LLP, by Mark E. Anderson, David E. Finkelson, and Miles O. Indest, for Defendant Dr. Robert Roscigno.

Earp, Judge.

I. BACKGROUND

5. The following is a summary of Plaintiff’s allegations that are relevant to the Motion before the Court. (*See* First Amended Complaint, ECF No. 15.)¹

¹ Additional background is included in the Court’s Order and Opinion on Defendants’ Motion to Dismiss Plaintiff United Therapeutics Corporation’s First Amended Complaint, (ECF No. 55).

6. The parties in this case are two competing pharmaceutical companies and an executive who worked for both companies at different times in his career.

7. Roscigno was employed by UTC and its subsidiary, Lung Rx, from approximately 1997 to 2007, during which time he contributed to the development of treatments for pulmonary arterial hypertension (“PAH”). His work at Lung Rx focused on two treprostinil² treatments marketed under the brand names Tyvaso® and Remodulin®.

8. After Roscigno left Lung Rx, he eventually went to work for Liquidia, a company that is developing another treprostinil product for the treatment of PAH. UTC claims that when Roscigno left Lung Rx, he took with him trade secrets and other confidential information pertaining to the development of Tyvaso® and Remodulin® and then disclosed the information to Liquidia, giving Liquidia an unfair advantage in the development of its competing product. UTC claims to have first discovered this wrongdoing in May 2021, when Liquidia produced documents in an earlier lawsuit between UTC and Liquidia.

II. PROCEDURAL HISTORY

9. UTC filed its original complaint in this action on 10 December 2021, (ECF No. 3). It asserted claims for misappropriation of trade secrets under both state and federal law and conversion (against Liquidia and Roscigno) as well as violations

² Treprostinil is a drug used in the treatment of lung disease. See National Library of Medicine, *Treprostinil*, www.ncbi.nlm.nih.gov/books/NBK545152/ (last visited July 20, 2023).

of the UDTPA (against Liquidia alone). Defendant Roscigno subsequently removed the case to federal court on 7 January 2022. (ECF No. 6.)

10. On 10 January 2022, UTC filed its First Amended Complaint dismissing the sole federal cause of action. (ECF No. 15.) On 31 March 2022, the case was remanded back to the Business Court. *See United Therapeutics Corp. v. Liquidia Corp.*, 2022 U.S. Dist. LEXIS 123346, at *9 (M.D.N.C. Mar. 31, 2022).

11. UTC subsequently dismissed its claim for conversion against both Liquidia and Roscigno on 27 May 2022, (ECF No. 31).

12. On 7 July 2022, UTC submitted a Business Court Rule (“BCR”) 10.9 request regarding five documents that UTC claims contain its trade secrets and that it had identified as having been misappropriated in its First Amended Complaint. UTC alleges that these documents were in Liquidia’s possession, as evidenced by the fact that they were produced by Liquidia in discovery in the earlier lawsuit. The parties disagreed about whether a protective order entered in the earlier case permitted Liquidia to produce the five documents in the case before this Court.

13. On 27 July 2022, the Court issued a consent order resolving the BCR 10.9 dispute and providing for the production of the five documents at issue. (ECF No. 46.) No other documents from the earlier lawsuit were brought to the attention of the Court, and no other relief was requested.

14. In the meantime, on 21 July 2022, the Court entered a Case Management Order (“CMO”) setting the deadline for fact discovery as 1 March 2023, (ECF No. 44).

15. Thereafter, on 16 February 2023, in response to UTC's motion, the Court entered an Amended CMO extending the deadline for fact discovery to 3 July 2023, (ECF No. 72).

16. On 20 June 2023, the fact discovery deadline was again extended on UTC's motion, this time to 6 October 2023, (ECF No. 115). A Third Amended CMO extending the deadlines for expert reports, expert discovery, and post discovery motions was entered on 23 June 2023, (ECF No. 118).

17. UTC filed this Motion on 10 April 2023. After full briefing, the Court held a hearing on the Motion on 20 June 2023. All parties were present and participated through counsel. The Motion is now ripe for disposition.

III. LEGAL STANDARD

18. After a responsive pleading has been served, a party may amend his pleading only by leave of court or by written consent of the adverse party. N.C.G.S. § 1A-1, R. 15(a). “[L]eave shall be freely given when justice so requires.” *Id.* Even so, “the right to amend pursuant to Rule 15 is not unfettered.” *Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, at *17 (N.C. Super. Ct. Dec. 22, 2021) (citing *Vaughan v. Mashburn*, 371 N.C. 428, 433 (2018)). Reasons to deny a motion to amend include “undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment.” *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 89 (2008) (quoting *Nationsbank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 268 (1994)).

19. A court may consider the timing of a proposed amendment in relation to the progress of the lawsuit and may deny a motion to amend when the record offers no explanation for a significant delay. *See, e.g., Columbus Life Ins. Co. v. Wells Fargo Bank, N.A.*, 2022 NCBC LEXIS 40, at **10-11 (N.C. Super. Ct. May 3, 2022). When undue prejudice is argued, “[t]he burden is upon the opposing party to establish that that party would be prejudiced by the amendment.” *Mauney v. Morris*, 316 N.C. 67, 72 (1986). In the end, a “motion for leave to amend is addressed to the sound discretion of the trial judge[.]” *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 430 (1990); *see also House of Raeford Farms, Inc. v. Raeford*, 104 N.C. App. 280, 282 (1991).

IV. ANALYSIS

20. UTC seeks leave to amend its First Amended Complaint to add both a parent and an affiliate of Liquidia as defendants and a subsidiary of UTC as a plaintiff. The Motion also seeks to amend the complaint to reflect the “more extensive” scope of Defendants’ alleged misdeeds by expanding the fact allegations and adding claims. (Br. Supp. Mot. Amend Compl. 3 [“Pl.’s Br.”], ECF No. 81.) UTC contends that “[d]ocuments largely found in Liquidia’s February 10, 2023 production make clear that the scope of Defendants’ acquisition and use of UTC’s trade secrets was far more extensive and damaging than just the five trade secret documents originally identified in the Amended Complaint.” (Pl.’s Br. 3.)

21. Defendants oppose many of the proposed amendments, arguing both that UTC has unduly delayed in requesting them and that, if allowed, the

amendments would unduly prejudice them. (*See generally* Defs.’ Br. Opp. Pl.’s Mot. Amend Compl. [“Defs.’ Br.”], ECF No. 86.)

A. New Parties

22. The Court first addresses UTC’s motion to add its subsidiary, Lung Rx, (now known as Lung Biotechnology PBC), as a plaintiff, and to add both Liquidia’s parent entity, Liquidia Corporation, and an affiliate, Liquidia PAH, LLC f/k/a RareGen, LLC (“RareGen”), as defendants.

23. Defendants argue that UTC has known about these entities from the start of this case and has not provided a sufficient justification for its delay in including them. Defendants further contend that the amendment would prejudice them by resulting in an extension of the case management deadlines. (Defs.’ Br. 6-7, 9-11, 17-19.)

24. Roscigno’s involvement with Lung Rx has been apparent from the beginning of this action, (*see* Complaint ¶¶ 2, 12, 14-15, ECF No. 3). Consequently, adding it as a party should come as no surprise. It also should not result in a delay in the proceedings. Indeed, counsel for Roscigno stated during the hearing that the parties have been treating UTC and Lung Rx as a single entity in discovery all along. (MTA Hr’g Tr. 40:23-42:6; Defs.’ Br. Ex. 10 [“Employment Agreement”], ECF 104.) Accordingly, UTC’s motion to add Lung Rx (now Lung Biotechnology PBC) as a plaintiff shall be GRANTED.

25. On the other hand, UTC did not mention RareGen or Liquidia Corporation in its earlier pleadings despite clearly knowing about these entities and

their businesses.³ UTC has not provided a satisfactory reason for its delay. Moreover, adding these entities would necessitate additional pleadings, possible motion practice, and even more discovery when significant discovery has already been completed or is substantially underway and scheduled to be completed in fewer than three months.⁴ The Court concludes that an attempt to add these entities as defendants now both comes too late and would unduly prejudice Defendants. *See Carter v. Rockingham Cnty. Bd. of Educ.*, 158 N.C. App. 687, 690-91 (2003) (affirming trial court's denial of motion to amend because the "amendment to add the parties would have caused undue delay or undue prejudice to defendants"); *Zagaroli v. Neill*, 2017 NCBC LEXIS 103, at *40 (N.C. Super. Ct. Nov. 7, 2017) ("Although Plaintiff states that the amendment would not require additional discovery, Plaintiff should know full well that the Court could not permit Plaintiff to add new parties as defendants in this action without permitting those new party-defendants to obtain discovery."). Accordingly, UTC's motion to add RareGen and Liquidia Corporation as defendants in this action shall be DENIED.

³ UTC and RareGen are litigants in a separate action in New Jersey that began in April 2019. (*See* Defs.' Br. Ex. 8, ECF No. 86.10.) Moreover, in the instant case, UTC identified RareGen in its interrogatory responses served almost a year ago. (*See* Defs.' Br. Ex. 5, ECF No. 86.7.)

⁴ The discovery process in this case has involved heavy document production and much controversy. The Court has been called upon to resolve multiple BCR 10.9 disputes and has twice extended the deadline for fact discovery at UTC's request. (*See* ECF Nos. 71, 83, 115, 118.)

B. New Allegations of Trade Secret Misappropriation

26. UTC seeks to add allegations regarding misappropriated trade secrets that it contends it discovered by reviewing Liquidia's document production in this case. UTC argues that documents Liquidia produced in February 2023 reveal that Roscigno took more trade secrets than UTC originally believed. It proposes to amend its complaint to reflect this discovery. (Pl.'s Br. 4-6.)

27. Defendants oppose the amendments and maintain that UTC has been in possession of the documents on which it now relies since May 2021, when the same documents were produced in earlier litigation. They argue that the proposed amendments would result in additional discovery, prolong the case, and increase the risk of damage to Dr. Roscigno's reputation. Thus, Defendants argue that the amendments should be denied on grounds of both undue delay and undue prejudice. (Defs.' Br. 6-9, 11-15, 17-19.)

28. Even if the documents on which UTC relies were included among the thousands produced in earlier litigation, a protective order entered in the earlier case created uncertainty about UTC's ability to use those documents in this litigation. Moreover, until they were produced in the case sub judice, UTC's counsel did not know of their existence. (*See* MTA Hr'g Tr. 7:3-8:13, 25:2-27:9, 37:6-20, 42:13-43:7; Consent Order, ECF No. 46.) After they became aware of the documents as a result of reviewing the February 2023 document production, UTC moved promptly to amend. Further, the proposed amendments to the misappropriation of trade secrets cause of action do not fundamentally change the nature of the claims against

Defendants. *See Window World of Baton Rouge, LLC v. Window World, Inc.*, 2017 NCBC LEXIS 217, at *4-5 (N.C. Super. Ct. Jan. 5, 2017) (allowing an amendment when new allegations “are sufficiently related to and intertwined with” the pre-existing allegations); *Columbus Life Ins. Co.*, 2022 NCBC LEXIS 40, at **14 (“Given the allegations in both the Complaint and Defendant’s existing counterclaim, the circumstances [alleged in the amendment] were always going to be a major topic of discovery.”); *see also Clark v. Barber*, 20 N.C. App. 603, 605 (1974) (“It is clear that the court has authority under Rule 15(b) to permit an amendment to the pleadings at any time when there is no material prejudice to the opposing party and such amendment will serve to present the action on its merits.”).

29. Accordingly, after careful consideration, the Court determines that UTC’s motion to add allegations that were gleaned from documents produced by Liquidia in February 2023 and that further describe the alleged misappropriation of trade secrets shall be GRANTED.

C. UTC’s New Claims

30. UTC seeks to bring new causes of action against Roscigno to “match the severity of the situation.” (Pl.’s Br. 7.) The newly proposed claims include breach of fiduciary duty, constructive fraud, breach of contract, and violation of the UDTPA. UTC also seeks to add a claim requesting a declaratory judgment with respect to Roscigno’s employment agreements with UTC and Lung Rx.

31. Defendants oppose the amendments and argue that the motion to add these new claims comes too late and would unduly prejudice them if allowed.

(Defs.' Br. 2.) Defendants contend that UTC has been aware of the facts it alleges support these proposed claims since well before the inception of this case.

(Defs.' Br. 4-5.) They argue that adding the claims would result in more expansive discovery and prolonged litigation. Defendants maintain that UTC should have brought these claims when it filed its original complaint on 10 December 2021.

(Defs.' Br. 13-15.)

32. The Court agrees that UTC's proposed new claims against Roscigno for breach of fiduciary duty, constructive fraud, and violation of UDTPA come too late, as does the proposed expansion of the UDTPA claim against Liquidia. The proposed claims all center on Roscigno's alleged misappropriation of UTC's trade secrets while he was working on treprostinil treatments. Nothing prevented UTC from including them when it filed its lawsuit over nineteen (19) months ago. *See, e.g., Micro Capital Invs., Inc. v. Broyhill Furniture Indus.*, 221 N.C. App. 94, 101-03 (2012) (affirming a trial court's denial of a motion to amend when "a claim that could have been argued in the alternative in the original complaint or in the first amended complaint based on the information known to plaintiff at the time"); *Rabon v. Hopkins*, 208 N.C. App. 351, 355-56 (2010) (affirming a trial court's denial of a motion to amend when the plaintiff moved to amend nine months after filing the complaint without providing a sufficient explanation for the delay).

33. Similarly, the proposed new claims for breach of contract and declaratory judgment come too late. The focus of both claims is on two employment agreements between UTC (or its subsidiary Lung Rx) and Roscigno dating back to

1997 and 2007, respectively. UTC referenced the employment agreements several times in its initial complaint filed over a year and a half ago. (Complaint ¶¶ 14, 18, 22, 32.) There is nothing new here. As with its other proposed claims, UTC had the ability to bring claims for breach of contract and declaratory judgment in December 2021, and it did not. It offers no reasonable explanation for this delay.⁵ *See Micro Capital Investors, Inc.*, 221 N.C. App. at 102 (affirming denial of motion to amend because the claim could have been raised in an earlier pleading “based on the information known to plaintiff at the time”); *cf. Strickland v. Lawrence*, 176 N.C. App. 656, 667 (2006) (affirming trial court’s denial of motion to amend when plaintiffs presented no evidence to support their claim that the amendment was based upon information obtained in discovery).

34. Further, adding the proposed claims at this juncture would unduly prejudice Roscigno and Liquidia by requiring them to address new legal theories and undergo discovery regarding new alleged wrongdoing when they are in the throes of completing discovery and preparing for motion practice. Allegations that Liquidia poached UTC employees, for example, have little, if anything, to do with Roscigno allegedly stealing trade secrets. Likewise, the breach of contract and declaratory judgment claims would present new legal issues about the enforceability of employment agreements and the ownership of intellectual property that heretofore have not been a focus of this case. *See, e.g., Stetser v. TAP Pharm. Prods. Inc.*, 165

⁵ UTC admits to knowing of Roscigno's alleged breaches in May 2021. (*See Proposed Second Amended Complaint* ¶ 108.)

N.C. App. 1, 32 (2004) (affirming denial of motion to amend because “[d]ifferent evidence would be necessary to support these additional legal claims, which could involve more discovery for the parties, slow the litigation process, and present a more unwieldy litigation for the trial court to administrate.”); *Freese v. Smith*, 110 N.C. App. 28, 33 (1993) (affirming the denial of a motion to amend when “the addition of a new legal theory may well have changed defendant’s approach to discovery”); *Kixsports, LLC v. Munn*, 2019 NCBC LEXIS 92, at *4-7 (N.C. Super. Ct. Jan. 24, 2019) (denying amendment because it would have disrupted the case management schedule, added entirely new theories of liability, changed defense counsel’s strategy, and increased the stakes of litigation).

35. The proposed new UDTPA claim against Roscigno would unquestionably change the stakes in this litigation for him. *See Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 727 (1980) (affirming the trial court’s denial of a motion to amend when the addition of a UDTPA claim “would not only greatly change the nature of the defense to what was a breach of contract action but also would subject defendant to potential treble damages which greatly increased the stakes of the lawsuit.”).

36. Therefore, UTC’s Motion to Amend Complaint to (a) add claims against Roscigno for breach of fiduciary duty, constructive fraud, breach of contract, and violation of UDTPA, (b) expand the existing UDTPA claim against Liquidia, and (c) add a claim for declaratory judgment against both Liquidia and Roscigno shall be DENIED.

V. CONCLUSION

37. WHEREFORE, for the foregoing reasons, and in the Court's discretion, Plaintiff's Motion to Amend Complaint is GRANTED in part and DENIED in part as follows:

- a. Lung Biotechnology PBC (formerly Lung Rx) may be added as a plaintiff, but the motion to add Liquidia PAH, LLC (formerly RareGen, LLC) and Liquidia Corporation as defendants is DENIED;
- b. UTC's motion to add allegations supporting the misappropriation of trade secrets claim arising from documents produced by Liquidia in February 2023 is GRANTED;
- c. UTC's motion to add new claims against Defendant Roscigno, to expand the UDTPA claim against Liquidia, and to add a claim for declaratory judgment (proposed amended paragraphs 41-48, 71-72, 80-113, and corresponding Prayers for Relief) is DENIED;
- d. UTC is hereby ORDERED to refile its Second Amended Complaint consistent in form and substance with this Order within ten (10) days.

IT IS SO ORDERED, this the 20th day of July, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases