

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

ICE CORPORATION,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-4135-JAR
)	
HAMILTON SUNDSTRAND CORPORATION,)	
)	
and)	
)	
RATIER-FIGEAC, S.A.S.,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

This matter comes before the court upon plaintiff's Motion for Leave to Amend Complaint (Doc. 341). Defendants have filed a response (Doc. 391) to which plaintiff has filed a reply (Doc. 410). Also pending before the court are plaintiff's contentions set forth in its Memorandum Supporting Inclusion within Pretrial Order of Claims for Breach of the Proprietary Information Agreement and Common Law Unfair Competition (Doc. 360). Defendants have filed a response in opposition (Doc. 394) to which plaintiff has filed a reply (Doc. 416). The issues are therefore fully briefed and ripe for disposition.

I. Motion for Leave to Amend Complaint (Doc. 341)

As detailed below, the court denies plaintiff's motion to amend its complaint.

A. Background

Plaintiff filed its original complaint on November 15, 2005 (Doc. 1). The parties' original scheduling order provided August 4, 2006 as the deadline to seek leave to join additional parties or otherwise amend the pleadings (Doc. 32). Subsequently, upon various motions of the parties, the

court granted leave to extend time to amend pleadings on four separate occasions (Docs. 48, 66, 75, and 95). On October 30, 2006, Plaintiff filed a Motion for Leave to File [its] First Amended Complaint (Doc. 100), which the court granted (Doc. 106). All discovery, except for certain specific matters outlined by the court, concluded on July 18, 2007 (Doc. 277).

B. Parties' Contentions

On July 23, 2007, plaintiff filed the instant motion for leave to amend its complaint to add a claim of promissory estoppel.¹ Plaintiff asserts that the new claim is “premised upon the same existing factual allegations . . . already described in the First Amended Complaint, which . . . have been the subject of extensive discovery.”² Plaintiff offers no reason as to why its motion to amend is untimely, but rather argues that leave to amend is freely given and that defendants have not, and cannot, demonstrate prejudice.³ Defendants oppose this motion on the grounds that it is untimely, prejudicial and futile.⁴

C. Standard

Pursuant to Fed. R. Civ. P. 15(a), once a responsive pleading has been filed, “a party may amend only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Ordinarily, leave to amend will be freely granted absent “a showing of undue delay, bad faith or dilatory motive, failure to cure deficiencies by amendments previously

¹Plaintiff’s Motion for Leave to Amend Complaint (Doc. 341) at p. 1.

²*Id.*

³Reply (Doc. 410) at p. 3.

⁴Response in Opposition (Doc. 391) at p. 4.

allowed, or undue prejudice to the opposing party, or futility of amendment.”⁵

Pursuant to Fed. R. Civ. P. 16(b), a “schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.” The movant seeking to extend a deadline in the parties’ scheduling order must establish good cause by demonstrating that the movant could not have met the deadline with due diligence.⁶ “Untimeliness alone is sufficient reason to deny leave to amend the complaint, especially if plaintiff fails to offer an explanation for the delay.”⁷ Moreover, “where the party seeking an untimely amendment knows or should have known of the facts upon which the proposed amendment is based, but fails to assert them in a timely fashion, the motion to amend is subject to denial.”⁸

When a motion to amend is filed out of time, “the court must examine the liberal amendment policy of Fed. R. Civ. P. 15(a) in conjunction with the good cause standard of Fed. R. Civ. P. 16(b).”⁹ In making this examination, courts in the District of Kansas “consistently have held that, when considering a motion to amend filed after the date established in a scheduling order, the court must determine whether ‘good cause’ within the meaning of Fed. R. Civ. P. 16(b) has been sufficiently demonstrated to justify allowing the untimely motion and if the Fed. R. Civ. P. 15(a)

⁵*Castleglen v. Resolution Trust Corp.*, 984 F.2d 1571, 1585 (10th Cir. 1993) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

⁶*McCormick v. Medicalodges, Inc.*, No. 05-2429-KHV, 2007 WL 471127, at *2 (D. Kan. Feb. 8, 2007) (citing *Denmon v. Runyan*, 151 F.R.D. 404, 407 (D. Kan. 1993); Advisory Committee’s Notes to the 1983 amendments to Fed. R. Civ. P. 16).

⁷*Graphic Techs., Inc. v. Pitney Bowes, Inc.*, 998 F. Supp. 1174, 1181–82 (D. Kan. 1998).

⁸*Potts v. Boeing Co.*, 162 F.R.D. 651, 653 (D. Kan. 1995).

⁹*McCormick*, 2007 WL 471127, at *2.

standards have been satisfied.”¹⁰

The Tenth Circuit has left undecided the issue of whether “a party seeking to amend its pleading after the scheduling order deadline must show ‘good cause’ for the amendment under Rule 16(b) in addition to the Rule 15(a) requirements.”¹¹ However, in *Minter v. Prime Equip. Co.*, the Tenth Circuit noted “the rough similarity between the ‘good cause’ standard of Rule 16(b) and our ‘undue delay analysis under Rule 15[.]’”¹² To that end, in evaluating undue delay under Rule 15(a) the Tenth Circuit “focuses primarily on the reasons for the delay.”¹³ For example, “unexplained delay alone justifies the district court’s discretionary decision”¹⁴ to deny leave to amend and “courts have denied leave to amend where the moving party was aware of the facts on which the amendment was based sometime prior to the filing of the motion to amend.”¹⁵

D. Discussion

Plaintiff’s Motion for Leave to Amend Complaint was filed almost nine months after the deadline. As a result, the court applies both Rules 16(b) and 15(a) in evaluating whether plaintiff should be permitted to amend its complaint.

Plaintiff has made no showing that, with due diligence, it could not have met the deadline

¹⁰*Id.* (citing *Deghand v. Wal-Mart Stores, Inc.*, 904 F. Supp. 1218, 1221 (D. Kan. 1995) (applying this two-part inquiry) (citing *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1518 (10th Cir. 1990)); *Denmon*, 151 F.R.D. at 407 (same)).

¹¹*Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1204 n. 4 (10th Cir. 2007).

¹²*Id.*

¹³*Id.* at 1206 (citing *Frank v. U.S. West*, 3 F.3d 1357, 1365-66 (10th Cir. 1993)).

¹⁴*Id.* (citing *Durham v. Xerox Corp.*, 18 F.3d 836, 840 (10th Cir. 1994)).

¹⁵*Id.* (citing *Fed. Ins. Co. v. Gates Learjet Corp.*, 823 F.2d 383, 387 (10th Cir. 1987)).

for leave to amend. Plaintiff emphasizes that the proposed new claim of promissory estoppel is premised on allegations and evidence existing in current pleadings, on which defendants have had the opportunity of full discovery.¹⁶ Plaintiff's assertions, however, undermine a finding of "good cause" because they indicate that plaintiff could have timely sought to amend its complaint because discovery has already taken place on these allegations and facts.¹⁷

Plaintiff also contends that because the undersigned allowed defendants to amend their answers after the passage of the October 29, 2007 deadline, the court should also allow plaintiff to amend its complaint. However, the reasons for which the court permitted defendants to amend their answers differ significantly from that of the instant motion. During the depositions of plaintiff's managers and engineers in late January 2007 defendants learned of Project X. Because of what defendants learned of Project X during these depositions, defendants believed Project X allowed plaintiff to offset damages it claimed against defendants in the instant action and on February 2, 2007, defendants served plaintiff with certain interrogatories and requests for production of documents regarding the project. Plaintiff, believing these requests irrelevant, refused to answer these interrogatories or produce responsive documents. As a result, on April 4, 2007, defendants filed a motion to compel responses to this written discovery which the court granted on May 24, 2007 and required plaintiff to respond to by June 14, 2007. Less than a month later, or on July 11,

¹⁶Motion for Leave to Amend Complaint (Doc. 341) at p. 3.

¹⁷See e.g., *Guang Dong Light Headgear Factor Co. v. ACI International*, No. 03-4165-JAR, 2007 U.S. Dist. LEXIS 62255, at *6 (D. Kan. August 22, 2007)(finding an argument that defendant was not prejudiced by an amendment to the pleadings brought after the pretrial order "actually buttresses the contention that [the movant] should have amended its pleadings sooner, as they were aware of the factual basis upon which a request for punitive damages would be justified.").

2007, defendants sought leave, which the court granted, to amend their answers.¹⁸ In allowing defendants to amend their answers the court noted that “[p]laintiff does not appear to truly oppose the relief at issue.”¹⁹

However, unlike defendants’ discovery of Project X which occurred after the deadline to amend pleadings but before the conclusion of discovery, plaintiff does not claim it learned of new evidence or information during discovery, after it was allowed to file its first Amended Complaint (Doc. 108) on November 14, 2006, which would lead it to believe it could seek additional claims against defendants. An unopposed motion wherein the movant has demonstrated good cause as to why leave to amend was not timely sought differs significantly from the situation before the court. Moreover, under the Tenth Circuit’s analysis of undue delay in the context of Rule 15(a), the court finds plaintiff’s unexplained and significant delay in seeking to amend its complaint further justifies denial of its motion for leave to amend.

II. Memorandum Supporting Inclusion within Pretrial Order of Claims for Breach of the Proprietary Information Agreement and Common Law Unfair Competition (Doc. 360)

As detailed below, the court will include in the pretrial order plaintiff’s claims for (1) breach of the Proprietary Information Agreement and (2) common law tortious unfair competition.

A. Background

On July 26, 2007, the court conducted an initial final pretrial conference with the parties.²⁰ At this conference the parties disagreed over what claims could be included in the pretrial order itself. Specifically, plaintiff contended that breach of the Proprietary Information Agreement

¹⁸Memorandum and Order (Doc. 367).

¹⁹*Id.* at p. 7.

²⁰Minute Entry (Doc. 347).

(“PIA”) signed by defendant Hamilton and a claim of common law unfair competition could be included in the pretrial order. Defendants disagreed. To that end, the court required plaintiff to file a motion or memorandum regarding whether its pleadings had sufficiently raised claims for the “alleged misappropriation of proprietary information claim under Kansas contract law, other common law theories of recovery and/or pursuant to the Kansas Trade Secrets Act.”²¹

B. Parties’ contentions

Plaintiff contends that because it alleged misappropriation of proprietary information for the purpose of unfair competition and misappropriation of confidential and proprietary information, in addition to trade secrets, claims for breach of the Proprietary Information Agreement (“PIA”) and common law claim of unfair competition arising out of defendants’ alleged misuse of plaintiff’s confidential and proprietary information should be included in the pretrial order.

In turn, defendants argue that plaintiff did not raise these claims in its amended complaint, and as a result the court should not permit plaintiff to include these claims in the parties’ pretrial order. Defendants further argue that the breach of contract claim based on the PIA should not be allowed on grounds of futility and that the claim for unfair competition should not be allowed because Kansas does not recognize a common law action for unfair competition based on misappropriation of proprietary information.

C. Standard

Rule 8(a) requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(a) “mean[s] what is sa[ys]”, and requires only a “short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the

²¹*Id.*

grounds upon which it rests.”²² “The Supreme Court has emphasized that the requirements at the pleading stage are *de minimus*.”²³ However, “the liberal construction accorded a pleading . . . does not require courts to fabricate a claim that a plaintiff has not spelled out in his pleadings.”²⁴

Fed. Rule Civ. P 16(c) outlines the subjects for consideration at a pretrial conferences and allows the court to “take appropriate action with respect to . . . the formulation and simplification of the issues” and “such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.” “Since the whole purpose of Rule 16 is to clarify the real nature of the dispute at issue, attorneys at a pre-trial conference must make a full and fair disclosure of their views as to what the real issues of the trial will be.”²⁵ Fed. R. Civ. P. 16(e) governing pretrial orders provides in part: “After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order.” Generally, “[t]he laudable purpose of Fed. R. Civ. P. 16 is to avoid surprise, not foment it.”²⁶

To that end, “claims or defenses not contained in the pleadings should normally not appear

²²*Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)(citation omitted); *Green Country Food Market, Inc. v. Bottling Group*, 371 F.3d 1275, 1279 (10th Cir. 2004)(same). Defendants do not dispute this standard. See Response (Doc. 394).

²³*United Steelworkers of Am. v. Oregon Steel Mills, Inc.*, 322 F.3d 1222, 1228 (10th Cir. 2003); *Frazier v. Ortiz*, 2007 U.S. App. LEXIS 257 at *4 (10th Cir. 2007).

²⁴*Shaub v. Newton Wall Company/UCAC*, 153 Fed. Appx. 461, 464-65 (10th Cir. 2005) (citing *Maniccia v. Brown*, 171 F.3d 1364, 1367 n.1 (11th Cir. 1999)).

²⁵*Youren v. Tintic School Dist.*, 343 F.3d 1296, 1304(10th Cir. 2003)(citing *Rios v. Bigler*, 67 F.3d 1543, 1549 (10th Cir. 1995)).

²⁶*Wilson v. Muckala*, 303 F.3d 1207, 1216 (10th Cir. 2002).

for the first time in the pretrial order because ‘such a practice deprives one's adversary of fair notice, possibly discovery, and the opportunity for motion practice, and is subject to abuse by those who employ a sporting theory of justice.’”²⁷ As a result, when a court confronts a new claim or defense sought to be included in a pretrial order, the court must “consider whether to approve or deny what is obviously an attempt to amend the pleadings at a rather late date.”²⁸

In *Burnette v. Dresser Indus., Inc.*, the Tenth Circuit affirmed a district court’s decision to exclude from the pretrial order product liability claims that were not raised in the complaint.²⁹ The court in *Burnette* based its decision not on whether the particular legal theory at issue had been explicitly alleged in the complaint, but whether the *factual allegations* in the complaint would support such a legal theory and place the defendants on notice that the claim would be pursued at trial.³⁰ Similarly, in *Shaub v. Newton Wall Company/UCAC* the court found that plaintiffs’ claim for age discrimination did not include sufficient facts so as to give defendant notice that plaintiffs also intended a claim for hostile work environment.³¹

Accordingly, the question before the court is whether plaintiff has alleged sufficient facts in its Amended Complaint to support the claims at issue to place defendants on fair notice of these claims.

²⁷*Shaub*, 153 Fed. Appx. at 464 (citing *Wilson*, 303 F.3d at 1215-16).

²⁸*Id.*

²⁹849 F.2d 1277, 1282-84 (10th Cir. 1988).

³⁰*Id.*

³¹*Shaub*, 153 Fed. Appx. at 464.

D. Discussion

As detailed below the court will include claims for breach of the PIA and common law unfair competition in the parties' pretrial order.

1. Breach of the PIA

The court believes plaintiff included sufficient allegations of fact about the PIA in its Amended Complaint and incorporated those facts into its breach of contract claim to put the defendants on notice that breach of the PIA would be an issue at trial. First, the Amended Complaint references agreements other than the Memorandum of Understanding plaintiff entered into with defendant Hamilton.³² The Amended Complaint also references the PIA, specifically,

In reliance upon the representations by Ratier and Hamilton that ICE had been selected to design and manufacture the de-icing controller, that ICE would sell in excess of five million dollars of de-icing controllers, and that Ratier was a subsidiary or affiliate of Hamilton, ICE signed a *proprietary agreement* forbidding use of ICE's proprietary information. ICE would not have signed the agreement nor would it have disclosed proprietary trade secret information to the defendants if it had known that the representations made to it were false.³³

Plaintiff also alleged facts claiming that the PIA was breached by defendants as "defendants have wrongfully appropriated confidential, proprietary and trade secret information created by ICE . . . and have disclosed or conveyed the information to competitors or other manufacturers of deicing systems, including Company A"³⁴ Plaintiff's breach of contract claim incorporates all previous allegations and states defendants "breached their *obligations* under the contract with ICE" without

³²Amended Complaint (Doc. 108) at p. 5 ("ICE relied to its detriment upon those representations in entering into the Memorandum of Understanding and other agreements, and in proceeding with design work and incurring expenses.").

³³Amended Complaint (Doc. 108) at p. 10-11(emphasis added).

³⁴*Id.* at p. 16.

specifically identifying the Memorandum of Understanding or the PIA in its claim for relief.³⁵

Considering the broad language of plaintiff's breach of contract claim and plaintiff's frequent and specific mention of defendants' alleged breach of the PIA, the court finds plaintiff sufficiently pled facts and incorporated those facts into its claim for breach of contract, such that defendants had sufficient notice that a breach of the PIA would be an issue at trial.

2. Is a claim for breach of the PIA futile?

Defendants argue that, even if plaintiff *could* bring a claim for breach of contract based on the PIA, the court should still bar plaintiff from doing so because the relief sought cannot be granted under the terms of the contract, and therefore the claim would be futile. However, plaintiff is not seeking to amend its Amended Complaint, rather plaintiff seeks merely the inclusion of a breach of the PIA in the parties' pretrial order. To that end, the court has determined that breach of the PIA is not a new claim, and as such the argument of "futility" is misplaced.

Even assuming the applicability of defendants' argument, the court finds plaintiff's claim for breach of the PIA is not futile. "The court may deny a motion to amend as futile if the proposed amendment would not withstand a motion to dismiss or otherwise fails to state a claim upon which relief may be granted."³⁶ Consequently, "'the court must analyze a proposed amendment as if it were before the court upon a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).'"³⁷ Only when it appears beyond a reasonable doubt that a plaintiff can prove no set of facts in support of the theory

³⁵*Id.* at p. 16-17(emphasis added).

³⁶*Stewart v. Bd. of Comm'rs for Shawnee County*, 216 F.R.D. 662, 664 (D. Kan. 2003)(citation omitted).

³⁷*Id.* (citing *Sheldon v. Vermonty*, 204 F.R.D. 679, 682 (D. Kan. 2001)).

of recovery that would entitle it to relief is dismissal of a claim under Rule 12(b)(6) appropriate.³⁸

Defendants base their futility argument on the fact that the PIA excludes “incidental, special or consequential damages.”³⁹ However, plaintiff’s breach of contract claim seeks judgment “in such amount as will fairly compensate Plaintiff for the harm suffered . . . attorneys’ fees, costs and expenses herein and for such further relief as the Court deems just and proper.”⁴⁰ That the PIA excludes incidental, special, and consequential damages does not mean it precludes plaintiff from seeking other damages. As a result, the court finds plaintiff’s *claim* for breach of the PIA is not futile.

3. Common law claim of unfair competition

Plaintiff argues that because it has alleged facts regarding not only misappropriation of trade secrets, but also of confidential and proprietary information and because the parties have conducted significant discovery over these later topics, it has sufficiently alleged a common law claim of unfair competition.

a. Standard

In *Airport Systems International, Inc., v. Airsys ATM, Inc.*, Judge Vratil noted that Kansas had not expressly addressed the existence of a common law tort of unfair competition outside the wrongful use of intellectual property.⁴¹ However, based on the Kansas Supreme Court’s previous

³⁸*Maier v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998).

³⁹Response in Opposition (Doc. 394) at p. 15 (citing Memorandum in Support (Doc. 360) at (Exhibit A) p. 3.).

⁴⁰Amended Complaint (Doc. 108) at p. 17.

⁴¹144 F. Supp. 2d 1268, 1271 (D. Kan. 2001)(citing *Koch Eng’g Co., Inc. v. Faulconer*, 227 Kan. 813, 610 P.2d 1094 (1980)).

ruling, Judge Vratil concluded that the Kansas Supreme Court “would apply the general principles outlined in the *Restatement (Third) of Unfair Competition* and allow an unfair competition claim based on misuse of trade secrets and other confidential business information.”⁴² The *Restatement (Third) of Unfair Competition* provides:

One who causes harm to the commercial relations of another by engaging in a business or trade is not subject to liability to the other for such harm unless:

(a) the harm results from acts or practices of the actor actionable by the other under the rules of this Restatement relating to

(1) deceptive marketing, as specified in Chapter Two

(2) infringement of trademarks and other indicia of identification, as specified in Chapter Three;

(3) appropriation of intangible trade values including trade secrets and the right of publicity, as specified in Chapter Four;

or from other acts or practices of the actor determined to be actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public; or

(b) the acts or practices of the actor are actionable by the other under federal or state statutes, international agreements, or general principles of common law apart from those considered in this Restatement.

In *Airport Systems* Judge Vratil further stated: “[u]nfair competition thus does not describe a single course of conduct or a tort with a specific number of elements; it instead describes a general category into which a number of new torts may be placed when recognized by the courts. The category is open-ended, and nameless forms of unfair competition may be recognized at any time for the protection of commercial values.”⁴³

Comment g to the *Restatement (Third) of Unfair Competition* states “a competitor who diverts business from another . . . through the wrongful use of confidential information, for example,

⁴²*Id.* See also *Accessible Techs., Inc. v. Paxton Auto. Corp.*, No. 01-2407-CM, 2002 U.S. Dist. LEXIS 19278, at *7 (D. Kan. Aug. 28, 2002)(similarly characterizing the ruling in *Airport Systems International, Inc.*).

⁴³*Airport Systems International, Inc.*, 144 F. Supp. 2d at 1271.

may in some circumstances be subject to liability for unfair competition even if the conduct is not specifically actionable under the rule relating to deceptive marketing or appropriation of trade secrets.”

As to whether the Kansas Uniform Trade Secrets Act (“KUTSA”) preempts a common law claim of unfair competition, “no Kansas state court has considered [whether] this preemption provision of the KUTSA [applies] to tortious interference claims[.]”⁴⁴ However, in *Mediware Information Systems, Inc. v. McKesson Information Solutions*, Judge Lungstrum “f[ound] the tortious interference claims alleged by [plaintiff] . . . [were] not ‘based upon misappropriation of trade secret’ and thus are not preempted” by the KUTSA.

b. Discussion

Here, assuming without deciding that plaintiff could allege a common law tort of unfair competition, the court finds ICE has pled sufficient facts in its Amended Complaint to warrant inclusion of this claim in the parties’ pretrial order.⁴⁵

Defendants are correct that plaintiff titled its Fifth Claim for Relief as “Misappropriation of Trade Secrets–K.S.A. 66-3320(4)[.]”⁴⁶ However, plaintiff’s Amended Complaint alleges misuse of “trade secret, confidential and proprietary information.” Specifically, plaintiff alleges

Defendants have wrongfully appropriated *confidential, proprietary and* trade secret information created by ICE in the course of its design and development of the deicing system

⁴⁴*Mediware Info. Sys., Inc. v. McKesson Info. Solutions*, No. 06-2391-JWL, 2007 WL 926142, at *2 n. 3 (D. Kan. March 26, 2007)

⁴⁵Whether plaintiff can state such a claim or whether the claim is preempted will likely be the subject of motion practice. At this point for the purposes of inclusion in the pretrial order it is enough that judges in this District have allowed plaintiffs to proceed on a similar common law claim.

⁴⁶Amended Complaint (Doc. 108) at p. 20.

for the A400M aircraft and have disclosed or conveyed that information to *competitors* or other manufacturers of deicing systems, including Company A, in order to give those competitors an *unfair advantage* or for *other wrongful purpose*.⁴⁷

Indeed, a close reading of plaintiff's Amended Complaint fleshes out this claim.

During the term of ICE's work on the A400M project, ICE owned all rights, title and interest to trade secrets, *confidential* and *proprietary* information that ICE used in the design and development of software and hardware necessary to meet the requirements for the deicing system and controllers.

....

Because of its relationship with Hamilton, its belief as to the relationship between Hamilton and Ratier, and its contract with Defendants, ICE provided Defendants with access to or knowledge of certain of ICE's *proprietary and* trade secret information. Such access was provided to or acquired by Defendants with the understanding that Defendants would not utilize such trade secrets or proprietary information for their personal gain and without ICE's consent or authorization.

....

Upon information and belief, Defendants knowingly and willingly disclosed such trade secrets *and confidential and proprietary* information belonging to ICE

....

Such trade secrets and *confidential and proprietary* information are primary assets of ICE, and ICE has carefully guarded these trade secrets *and information* and there has been no public disclosure of these trade secrets by ICE.

....

By reason of willful and knowing disclosure by Defendants of ICE's trade secrets *and proprietary and confidential* information, ICE has been damaged and will continue to be damaged.⁴⁸

Despite what plaintiff merely titled its Fifth Claim for Relief, a review of plaintiff's Amended Complaint itself reveals that plaintiff specifically articulated separate claims for misappropriation of trade secrets and misuse of proprietary and confidential information.

For example, as to its Fifth Claim, plaintiff prayed for the following relief:

judgment against Defendants, and each of them, as follows: (a) for a preliminary and permanent injunction enjoining Defendants from utilizing or disclosing any trade secret,

⁴⁷*Id.* at 16 (emphasis added).

⁴⁸*Id.* at 20-21 (emphasis added).

confidential or proprietary information of ICE in connection with the deicing systems and controllers on the A400M project; (a) actual damages in an amount sufficient to compensate ICE for the harm suffered by virtue of the misappropriation; © exemplary damages; (d) costs of suit incurred herein, including reasonable attorneys’ fees; and (e) such other and further relief as this Court deems just and proper.⁴⁹

Here, plaintiff again emphasized separate and distinct factual allegations as to defendants’ alleged misuse of plaintiff’s trade secrets *and* confidential or proprietary information.

Moreover, in light of the significant discovery defendants conducted regarding their alleged misuse of proprietary information, it further appears that plaintiff’s Amended Complaint alleged facts sufficient to put defendants on notice as to a common law claim for unfair competition. Specifically, defendants questioned plaintiff’s Chief Design Engineer Arlie Stonestreet in detail regarding the difference between “trade secrets” and “proprietary information” and plaintiff’s separate allegations as to the misuse of both.⁵⁰ Indeed, defendants acknowledged these *separate* claims by serving separate interrogatories regarding defendants’ alleged misuse of “confidential and proprietary information” and plaintiff’s “trade secrets” claim.⁵¹ Had defendants not been on notice as to plaintiff’s *separate* claims for misappropriation of trade secrets in violation of the KUTSA and plaintiff’s misuse of “*confidential and proprietary* [information] disclosed or conveyed . . . to *competitors* or other manufacturers . . . in order to give those competitors an *unfair advantage* or for *other wrongful purpose*” the court would wonder as to the relevance and necessity for defendants’ separate discovery of both.

Finally, because the court finds the breach of the PIA and the common law claim of unfair

⁴⁹ *Id.* at p. 22 (emphasis added).

⁵⁰ *See* Reply (Doc. 410) at p. 13-14 (citing Exhibit D to (Doc. 361)).

⁵¹ *Id.* at p. 12 (comparing Interrogatories Nos. 11 and 14 regarding confidential information with Interrogatories No. 10 and 13 regarding “trade secrets.”).

competition are not new claims, it need not analyze whether amendment of plaintiff's complaint at this late stage is appropriate.

IT IS THEREFORE ORDERED that plaintiff's Motion for Leave to Amend Complaint (Doc. 341) is denied.

IT IS FURTHER ORDERED that by January 14, 2008, the parties will jointly submit a revised proposed pretrial order including any revisions necessitated by the instant order. The court will schedule a final pretrial conference in consultation with the parties.

IT IS SO ORDERED.

Dated this 27th day of December, 2007, at Topeka, Kansas.

s/ K. Gary Sebelius
K. Gary Sebelius
U.S. Magistrate Judge