

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS 16373

KIXSPORTS, LLC,

Plaintiff,

v.

RYAN MUNN; TYLER VAUGHAN;
RENEGADE GK; BIG DREAMZ,
LLC; and MIRO GROUP, LLC,

Defendants and
Third-Party
Plaintiffs,

v.

CASEY CARR; and STEPHEN PYE,

Third-Party
Defendants.

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

RYAN MUNN; and TYLER
VAUGHAN, derivatively on behalf of
KIXSPORTS, LLC,

Derivative
Plaintiffs,

v.

CASEY CARR; and STEPHEN PYE,

Derivative
Defendants.

1. On December 17, 2018, Plaintiff Kixsports, LLC moved for leave to amend its second amended complaint. (ECF No. 105.) Defendants oppose the motion. After full briefing, the Court held a hearing on January 17, 2019. Having considered all matters of record and the arguments of counsel, the Court **DENIES** the motion.

2. This case arises out of a dispute between Kixsports and two of its members, Tyler Vaughan and Ryan Munn. Kixsports made and sold soccer gear and related products but now appears to be in the process of dissolving and winding up its business. It alleges that Vaughan and Munn wrongfully developed and began selling a new goalie glove through a competing business called Renegade GK.

3. The original complaint, filed on September 6, 2017, asserted claims for breach of fiduciary duty, breach of Kixsports's operating agreement, misappropriation of trade secrets, and others. (ECF No. 51.) On October 6, 2017, Kixsports amended the complaint as of right to add a claim for trademark infringement and to add two new defendants (Big Dreamz, LLC and Miro Group, LLC). (ECF No. 56.) On February 28, 2018, Kixsports filed another amendment, with leave of court, to add two more claims: (1) a conversion claim against Munn related to Kixsports's account with Amazon.com; and (2) a claim for breach of contract against Vaughan and Munn for failing to return all Kixsports property (specifically, a Microsoft Surface Tablet) upon termination of their Non-Exclusive Outside Sales Representation Agreement ("Representation Agreement"). (ECF No. 88.)

4. Since the last amendment, Kixsports has retained new counsel (in July 2018), and the case was designated as exceptional under Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts of North Carolina (in August 2018). (ECF No. 1.) The Court also entered a case management order (in September 2018), which adopted the parties' proposed schedule for completing any remaining discovery and briefing post-discovery dispositive motions. (ECF No. 98.)

5. In November 2018, Defendants moved for partial judgment on the pleadings. (ECF No. 102.) As relevant, that motion sought dismissal of Kixsports's claim for breach of the operating agreement. In response, Kixsports voluntarily dismissed the claim, (ECF No. 108), and moved for leave to amend its complaint for a third time, (ECF No. 105).*

6. The proposed third amended complaint adds a new claim seeking a declaratory judgment that Renegade GK belongs to Kixsports because, among other things, Defendants created it using Kixsports's resources. (Pl.'s Br. in Supp. Mot. to Amend 6, ECF No. 106 ["Pl.'s Br. in Supp."].) It also modifies the claim for breach of the Representation Agreement against Vaughan to include two new grounds: first, breach of a provision requiring Vaughan to use his best efforts to sell Kixsports products; and, second, breach of a restriction on the use of confidential information. (Pl.'s Br. in Supp. 7, 8.) (Kixsports voluntarily dismissed the claim for breach of the Representation Agreement as to Munn. (ECF No. 108.))

7. Rule 15(a) of the North Carolina Rules of Civil Procedure provides that courts should freely give leave to amend pleadings "when justice so requires." A motion for leave to amend is addressed to the sound discretion of the trial court. *E.g.*, *Draughon v. Harnett Cty. Bd. of Educ.*, 166 N.C. App. 464, 467, 602 S.E.2d 721, 724 (2004). "Acceptable reasons for which a motion to amend may be denied are undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue

* Defendants also sought dismissal of the claims for libel *per se* brought by Third-Party Defendants Casey Carr and Stephen Pye. (ECF No. 102.) Carr and Pye have since voluntarily dismissed the claims. (ECF Nos. 107, 108.)

prejudice and futility of the amendment.” *Nationsbank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 268, 447 S.E.2d 812, 815 (1994) (citation and quotation marks omitted); *see also, e.g., JPMorgan Chase Bank, N.A. v. Browning*, 230 N.C. App. 537, 541, 750 S.E.2d 555, 559 (2013).

8. The question here is whether Kixsports’s motion—filed fifteen months after the original complaint, fourteen months after the first amendment, and nine months after the second—is the product of undue delay. The Court concludes that it is.

9. The chief problem for Kixsports is that it has offered no reasonable explanation for its delay. In its opening brief, Kixsports contends that its request to add a claim for declaratory judgment was prompted by information obtained during discovery. (Pl.’s Br. in Supp. 6.) The only evidence that Kixsports offers is a December 2016 e-mail chain between Munn and a merchandiser in which Munn purportedly held out Renegade GK as a Kixsports brand. (Pl.’s Br. in Supp. Ex. C, ECF No. 106.3.) Kixsports does not explain when it first became aware of that e-mail chain, however, and Defendants point to evidence strongly suggesting that Kixsports knew of the information no later than November 2017 when it moved for preliminary injunction. (Br. in Opp’n Pl.’s Mot. to Amend 3, 7, ECF No. 111; *see* ECF Nos. 63, 64.) Thus, Kixsports could have asserted the declaratory-judgment claim at least as of the time of its second amended complaint, if not earlier. It has not offered a sufficient explanation for its decision to wait nearly another year before attempting to add the claim. *See Micro Capital Investors, Inc. v. Broyhill Furniture Indus.*, 221 N.C. App. 94, 102, 728 S.E.2d 376, 382 (2012) (affirming denial of motion to amend when claim

could have been raised in earlier pleading “based on the information known to the plaintiff at the time”); *see also Strickland v. Lawrence*, 176 N.C. App. 656, 667, 627 S.E.2d 301, 308 (2006).

10. So too for the proposed amendment to the claim for breach of the Representation Agreement. Kixsports does not point to any newly discovered information that prompted this request, and it appears that Kixsports could have included these allegations in February 2018 when it first asserted the claim. Again, Kixsports has not offered a sufficient explanation for waiting until December 2018 to assert these new allegations. *See Micro Capital Investors*, 221 N.C. App. at 102, 728 S.E.2d at 382.

11. In its reply brief, Kixsports suggests that its decision to obtain new counsel in July 2018 should excuse its delay. (Pl.’s Reply Br. in Further Supp. Mot. Am. 5–6, ECF No. 112.) It does not. Kixsports made a strategic decision about which claims to assert long before retaining its current counsel. Its desire to try a new strategy after switching counsel is not a sound basis for permitting an amendment to assert claims that it could have brought—but did not—in its earlier pleadings. And even if it were, Kixsports waited five months after retaining new counsel before filing its third motion to amend.

12. Kixsports contends that the amendments should be allowed, delay notwithstanding, because they would not require additional discovery and there would be no prejudice to Defendants. (Pl.’s Br. in Supp. 6.) The Court disagrees. There is a clear and significant difference between Kixsports’s current claims (which

seek damages for breaches of duties owed to Kixsports) and the new declaratory-judgment claim (which alleges that Kixsports *owns* Renegade GK). At present, Defendants face the possibility of substantial damages if Kixsports prevails. If the amendment were granted, Defendants could lose their business in its entirety—a material difference that would “greatly change the nature of the defense” and “greatly increas[e] the stakes of the lawsuit.” *House Healers Restorations v. Ball*, 112 N.C. App. 783, 786–87, 437 S.E.2d 383, 386 (1993) (internal citation and quotation marks omitted).

13. Likewise, Kixsports’s new allegations as to the claim for breach of the Representation Agreement would transform that claim. As initially alleged, Kixsports claimed that Vaughan failed to return a tablet computer as required by the Representation Agreement. The new allegations instead focus on whether Vaughan breached two wholly different provisions governing the solicitation of customers and the disclosure of confidential information. These are not additional supporting facts that “merely expand” the existing claim, as Kixsports contends; they are entirely new theories of liability.

14. Finally, it is highly likely that the amendment, if allowed, would disrupt the case management schedule in a case that has already been pending for 16 months. After designation as an exceptional case, the Court requested and entered a case management order designed to allow sufficient time to complete discovery. Both sides agreed to that schedule. At a minimum, the proposed amendment would require a new round of pleadings. And although Kixsports contends that nearly all of the

relevant discovery has already been conducted, that seems doubtful. It would be unreasonable to expect Defendants to forgo additional discovery in the face of a threat to the ownership of their business (particularly one that would involve transferring Renegade GK to an entity (Kixsports) that is dissolving and winding up its affairs). *See Hassett v. Dixie Furniture Co.*, 333 N.C. 307, 317, 425 S.E.2d 683, 688 (1993) (affirming denial of amendment when addition of new claim would cause delay and prejudice defendant); *see also Freese v. Smith*, 110 N.C. App. 28, 33, 428 S.E.2d 841, 845 (1993) (“We do not agree because the addition of a new legal theory may well have changed defendant’s approach to discovery.”).

15. In short, Kixsports has offered no reasonable explanation for its delay in bringing this motion. And reshaping this case at this late stage would result in prejudice to Defendants. These reasons, taken together, support denying the motion.

16. Therefore, the Court, in its discretion, **DENIES** Kixsports’s motion to amend.

SO ORDERED, this the 24th day of January, 2019.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases