

ASHBY & GEDDES

ATTORNEYS AND COUNSELLORS AT LAW

500 DELAWARE AVENUE

P. O. BOX 1150

WILMINGTON, DELAWARE 19899

TELEPHONE
302-654-1888

FACSIMILE
302-654-2067

May 7, 2024

The Honorable Gregory B. Williams
United States District Court
844 N. King Street
Wilmington, DE 19801

VIA CM/ECF ELECTRONIC FILING

Re: DISH Technologies L.L.C., et al. v. fuboTV Media Inc., C.A. No. 23-986-GBW

Dear Judge Williams:

Plaintiffs DISH Technologies L.L.C. and Sling TV L.L.C. (collectively, “DISH”) submit this letter in support of their Motion for Leave to File a First Amended Complaint (the “FAC”). The FAC specifically identifies by claim number the claims being asserted, adds hundreds of pages of detailed and substantive claim charts covering all of the asserted dependent claims, and pleads supplemental factual allegations to show novel and significant technical improvements of the claimed invention over the prior art. DISH requests that its motion be granted as it is supported by good cause and does not prejudice FuboTV.

I. Legal Standard

Under Fed. R. Civ. P. 15(a)(2), absent opposing party’s written consent, amending a pleading requires “the court’s leave,” which “[t]he court should freely give when justice so requires.” *See also Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006) (“Leave to amend must generally be granted unless equitable considerations render it otherwise unjust.”). Equitable considerations to deny leave to amend include “undue delay, bad faith, dilatory motive, prejudice, and futility.” *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000). The decision to grant leave to amend is in the discretion of the District Court. *Foman v. Davis*, 83 S.Ct. 227, 230 (1962).

The Third Circuit has “adopted a liberal approach to the amendment of pleadings” and recognizes that “prejudice to the non-moving party is the touchstone for the denial of an amendment.” *Arthur*, 434 F.3d at 204 (citing *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993)). In this regard, “delay alone is not sufficient to justify denial of leave to amend.” *Id.* (citing *Adams v. Gould Inc.*, 739 F.2d 858, 868 (3d Cir. 1984)). Only when delay becomes “undue,” such as when a party “fails to take advantage of previous opportunities to amend, [and] without adequate explanation,” should leave to amend be denied. *Id.*

II. Argument

The Court should grant DISH’s leave to amend as none of the factors for denial exist here.

The Honorable Gregory B. Williams

May 7, 2024

Page 2 of 3

1. There is no delay, much less “undue delay.”

This motion is made three months after FuboTV advanced a new argument in the body of its Reply, which prompted these amendments, and well before the Court’s deadline for DISH to identify and provide claim charts for all of the asserted claims (which has not yet been set). *See* Rule 16 Scheduling Order for Patent Cases (Non-ANDA) (GBW) at ¶3. Amending the complaint for clarity at this point does not introduce delay and instead streamlines the case.

In its Reply Brief (D.I. 16) filed on February 1, 2024, FuboTV argued that DISH did not properly assert any claims not specifically listed in its original complaint (D.I. 1, the “Complaint”) and argued for dismissal of the case *with prejudice* “[b]ecause the eight specifically-asserted claims are ineligible” under 35 U.S.C. § 101. *See* D.I. 16 at 3. FuboTV’s analysis was directed solely to example independent claims identified in the Complaint without regard to the additional claims (both independent and dependent) that DISH intends to assert. DISH’s amended complaint makes clear and provides detailed charts for all of the claims DISH intends to assert. DISH’s amendment—made three months after FuboTV advanced its argument—should not be considered a “delay,” much less delay that is “undue.” Judges in this District have granted leave to amend when a plaintiff confirmed facts at a much later stage in the case than the instant case, and this Court should likewise grant DISH’s leave to amend here. *See, e.g., Affinion Net Patents, Inc. v. Maritz, Inc.*, 2006 WL 1652677 (D. Del. 2006) (granting motion for leave to amend complaint filed the day before expert reports were due because plaintiff could not confirm certain facts until depositions that were held late in the discovery process).

Rather than causing any delay, DISH’s proposed amended complaint accelerates DISH’s disclosures. Over the past months, DISH has worked diligently to analyze all claims across eight asserted patents, drafting nearly 480 pages of infringement charts for 179 claims with enough detail to meet infringement contentions standards. Far from delaying the case, DISH is advancing the case by providing such detail before any deadline for infringement contentions is even set.

2. There is no prejudice to FuboTV.

The case is still in the pleadings phase, no scheduling order has been set, and discovery has not yet begun. FuboTV will not be prejudiced by amendment at such an early stage. *Cf., e.g., TQ Delta, LLC v. 2Wire, Inc.*, 2019 WL 1863269, *3-*4 (D. Del. 2019) (denying leave to amend complaint filed “over a year and a half after the scheduling order deadline, after the completion of summary judgment, and just two weeks before the ... trial is scheduled to begin,”); *Microthin.com, Inc. v. SiliconeZone USA, LLC*, 2010 WL 2025495, *5-*6 (Fed. Cir. 2010) (nonprecedential) (affirming denial of leave to amend after claim construction and summary judgment).

As explained above, identifying a list of claims asserted and providing updated infringement charts at the pleadings stage is to FuboTV’s benefit, not prejudice. DISH has invested significant resources to analyze hundreds of its claims, perform expert analysis of FuboTV’s products and services, and create detailed infringement charts showing how FuboTV’s products and services infringe DISH’s patents. Providing such detailed analysis well before contentions are due benefits FuboTV in preparing its response and streamlines the case.

With respect to the addition of supplemental factual allegations, those facts have already been made of record and thus there is no surprise or prejudice in their inclusion here.

The Honorable Gregory B. Williams

May 7, 2024

Page 3 of 3

3. DISH's request is made in good faith.

The FAC is a good faith attempt to streamline the case and to remove any confusion at the pleadings stage in light of FuboTV's recent arguments. DISH has ample reason to amend in light of these recent developments. And FuboTV cannot meet its burden to prove that DISH possesses any ill intent or dilatory motive in these reasonable amendments. *See Wizards of the Coast LLC v. Cryptozoic Entertainment LLC*, 309 F.R.D. 645, 649 (W.D. Wash. 2015) ("the party opposing amendment has the burden of showing that amendment is not warranted.").

4. Futility does not apply here.

DISH's proposed FAC contains additional factual allegations of technological improvements over the existing prior art in the early 2000s that, taken as true, would raise factual disputes underlying the § 101 analysis of FuboTV's Motion to Dismiss. Specifically, DISH pleads supplemental factual allegations to show the development of the patented invention, problems present in the prior art, and DISH's novel solution to those problems as claimed in the specifically identified list of claims.¹ Given this, any denial of leave to amend the Complaint as futile would be improper. *Id.* at 1126-27 ("allowing [plaintiff] to file the proposed amended complaint, which alleges facts directed to the inventive concept in its claimed invention, would not be futile.") (citing *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1097 (Fed. Cir. 2016)). Moreover, the FAC adds independent claims that were not the subject of the pending briefing.

III. Conclusion

DISH respectfully requests that the Court grant this motion and allow leave to file the FAC. Additionally, DISH has been advised that Patent No. 11,991,234 ("the '234 Patent") will issue on May 21, 2024. DISH respectfully reserves the right to seek leave to further amend the Complaint at a later time, including but not limited to asserting the newly issued '234 Patent.

Respectfully,

/s/ John G. Day

John G. Day (#2403)

JGD/nml

cc: Counsel of Record (via electronic mail)

¹ *See, e.g., Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1127 (Fed. Cir. 2018) (holding that the district court abused its discretion in denying leave to amend the complaint after granting a motion to dismiss under § 101 when "[plaintiff's] proposed second amended complaint supplies numerous allegations related to the inventive concepts present in the claimed [...] technology," including "the development of the patented invention," "the problems present in prior art," and "improvements and problems solved by the Aatrix patented inventions.") (internal citations omitted).