UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHAMPION POWER EQUIPMENT, INC.

Plaintiff,

Case No: 2:24-cv-01281-LA

v.

GENERAC POWER SYSTEMS, INC.

Defendant.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO SEVER DEFENDANT'S COUNTERCLAIMS FOR INFRINGEMENT OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE AN AMENDED ANSWER AND COUNTER-COUNTERCLAIM

EX1070
HARBOR FREIGHT TOOLS
IPR2025-01121

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I. INTRODUCTION

Champion Power Equipment, Inc. ("Champion") hereby submits this Memorandum in Support of its Motion to Sever Defendant's Counterclaims for Infringement or, in the Alternative, for Leave to File an Amended Answer and Counter-Counterclaims.

On October 9, 2024, Champion filed suit (ECF No. 1, the "Complaint") against Defendant Generac Power Systems, Inc. ("Generac"), accusing Generac of infringing eleven patents directed to multi-fuel generator systems.[1] The Complaint names five infringing multi-fuel generators sold by the Defendant by model number, ties each model to the patented claim(s) that it infringes, describes how Champion came to form the belief that the generator(s) infringes, and spells out the elements those generator(s) specifically include such that they infringe. *See generally* ECF No. 1.

On February 5, 2025, Generac filed its Answer and Counterclaims to the Complaint. ECF No. 21 (the "Original Answer"). In the Original Answer, Generac asserted counterclaims for non-infringement (ECF No. 21 at ¶¶ 10-29, 38-50, 126-180) and invalidity (ECF No. 21 at ¶¶ 30-37, 51-70, 181-235) as related to all of the Asserted Patents, along with unenforceability due to inequitable conduct as related to several[2] of the Asserted Patents (ECF No. 21 at ¶¶ 71-125). On February 26, 2025, Champion filed an answer (ECF No. 23) to Generac's counterclaims in the Original Answer.

Almost two months later, on May 15, 2025, Generac filed an "Amended Answer and

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[1] U.S. Patent No. 10,221,780, U.S. Patent No. 10,598,101, U.S. Patent No. 10,697,398, U.S. Patent No. 11,143,120, U.S. Patent No. 11,143,145, U.S. Patent No. 11,306,667, U.S. Patent No. 11,492,985, U.S. Patent No. 11,530,654, U.S. Patent No. 11,840,970, U.S. Patent No. 11,905,895, U.S. Patent No. 11,905,896 (collectively the "Asserted Patents").

[2] U.S. Patent No. 10,221,780, U.S. Patent No. 10,697,398, U.S. Patent No. 11,143,120, U.S. Patent No. 11,143,145, U.S. Patent No. 11,492,985, U.S. Patent No. 11,530,654, U.S. Patent No. 11,840,970, U.S. Patent No. 11,905,895.

Counterclaims" (ECF No. 30) where it asserted the same counterclaims from the Original Answer,[3] along with new counterclaims alleging Champion's infringement of U.S. Patent Nos. 10,563,596 and 11,248,540 (collectively the "Generac Patents"). ECF No. 30 at ¶¶ 11, 13-32, 149-160. Champion, on May 29, 2025, filed its answer to the Amended Answer and Counterclaims and asserted multiple defenses to Generac's counterclaims. ECF No. 31 at pp. 31-34, ¶¶ 1-6.

This Motion to Sever is brought because the newly-asserted Generac Patents relate to a wholly different and separate technology, *carbon monoxide ("CO") detection*, when compared to the Asserted Patents which relate to *fuel switch technology*. *Compare* ECF No. 1 at ¶¶ 11, 22, 33, 46, 59, 72, 85, 96, 107, 118, 129 *with* ECF No. 30 at ¶¶ 11, 13-32. Those two technologies: (1) are completely unrelated to one another; (2) implicate largely different products; (3) require different scientific analysis, different expert witnesses, and different fact witnesses; (4) increase the number of patents at issue in this case from 11 patents, to 15—adding 4 completely unrelated patents[4]; and (5) will certainly confuse the jury. *Compare* ECF No. 1 at ¶¶ 11, 22, 33, 46, 59, 72, 85, 96, 107, 118, 129 *with* ECF No. 30 at ¶¶ 11, 13-32. Indeed, there were only five products at issue in the Original Complaint. *See* ECF No. 1 at ¶¶ 13, 24, 35, 48, 61, 74, 87, 98, 109, 120, 131. The Amended Answer and Counterclaims now implicate three of Champion's products, none of which overlap with the products at issue in the Complaint or Generac's Original Answer.

Champion, upon receiving the Amended Answer and Counterclaims, began an investigation into the products newly-accused by Generac. Champion's answer, however, came due fourteen (14) days after being served with the Amended Answer and Counterclaims. As of the

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[3] ECF No. 30 at ¶¶ 33-52, 61-73, 161-215 (non-infringement), 53-60, 74-93, 216-270 (invalidity), 94-148, 271-280 (unenforceability).

[4] In addition to the two new unrelated Generac Patents directed to CO detection, Champion seeks to amend its answer to the Amended Answer and Counterclaims to add two Champion CO detection patents.

date of Champion's now-operative responsive pleading (ECF No. 31), that investigation was still incomplete due to the undertaking it required to evaluate different technology and the ***thirty-five (35)*** products that Champion, through the amendment sought by this Motion, seeks to accuse.

Champion has now completed its internal investigation and has determined that many Generac products infringe two of its patents for the detection of carbon monoxide, U.S. Patent Nos. 10,862,414 and 11,336,214 (the "Champion Responsive Patents"). The Champion Responsive Patents implicate at least ***thirty-five (35)*** Generac products, only two of which overlap with the products accused in the Complaint. *Compare* Exhibit 1 (Champion's Proposed Amended Answer and Counterclaims to Generac's Amended Answer, and Exhibits thereto) at ¶ 17 (Counterclaims)[5] *with* ECF No. 1 at ¶¶ 13, 24, 35, 48, 61, 74, 87, 98, 109, 120, 131.

Champion, thus, respectfully requests that this Court either: (1) sever Generac's counterclaims arising out of the Generac Patents (ECF No. 30 at ¶¶ 11, 13-32, 149-160) with the directive that Champion will be able to file the Amended Answer and Counter-Counterclaims attached hereto as Exhibit 1 to assert the Champion Responsive Patents as against Generac in the severed action; or (2) in the alternative, allow Champion leave to file an amended answer to Generac's Amended Answer and Counter-Counterclaims in order to assert the Champion Responsive Patents in the instant case.

II. LEGAL STANDARD

A. Severance Under Fed. R. Civ. P. 21

Federal Rule of Civil Procedure ("FRCP") 21 provides that "[t]he court may also sever any

[5] Unless otherwise noted herein, all citations to Ex. 1 are to the paragraph numbers in Champion's Defenses, beginning on page 31 of Ex. 1 and noted as (Defenses), or to Champion's Counterclaims, beginning on page 35 of Ex. 1 and noted as (Counterclaims). Any citation to the Exhibits attached to Ex. 1 will be made by citing the page number within Ex. 1.

claim against a party." Fed. R. Civ. P. 21 (emphasis added). The Seventh Circuit has instructed "a district court may sever claims under Rule 21, creating two separate proceedings, so long as the two claims are 'discrete and separate,'" *Gaffney v. Riverboat Serv. of Ind., Inc.*, 451 F.3d 424, 442 (7th Cir., 2006) *cert. denied*, 127 S.Ct. 933, 166 L.Ed.2d 703 (2007) (quoting *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1016 (7th Cir. 2000); *see also Kraft Foods Holdings, Inc. v. Proctor & Gamble Co.*, No. 07-cv-613-jcs, 2008 WL 4559703, at *2 (W.D.Wis. Jan. 24, 2008). To decide "whether claims are discrete and separate, the Court should consider whether they arose out of the same transaction or occurrence and whether they present common issues of law or fact." *Ribble v. Kimberly-Clark Corp.*, No. 09-C-0643, 2012 WL 1413293, at *1 (E.D. Wis. April 20, 2012) (citing *Rice*, 209 F.3d at 1016). Put another way, if the remaining claims are capable of resolution despite the outcome of the severed claims, then they are sufficiently discrete and separate. *Id*. (citing *Gaffney*, 451 F.3d at 442).

It is within the district court's broad discretion whether to sever a claim under FRCP 21. *See Hebel v. Ebersole*, 543 F.2d 14, 17 (7th Cir. 1976); *see also United States v. O'Neil*, 709 F.2d 361, 367 (5th Cir. 1983). The Seventh Circuit reviews the Court's decision to sever a claim on an abuse of discretion standard. *Gaffney*, 209 F.3d at 1016.

B. Leave to Amend

Champion also seeks leave to amend its Answer to assert infringement counter-counterclaims of carbon monoxide detection patents. FRCP 15(a)(2) applies to this request because the Scheduling Order (ECF No. 29) does not contemplate a pleading served after May 15, 2025—fourteen (14) days before Champion's responsive pleading to Generac's Amended Answer and

Counterclaims[6] even became due. Nevertheless, the standards for amending under FRCP 15(a)(2) and 16(b)(4) are both recited in the event that the Court chooses to consider this Motion under either Rule.

1. Leave to Amend Under Fed. R. Civ. P. 15(a)(2)

"Federal Rule of Civil Procedure 15(a) provides that if a party is not entitled to amend a pleading as a matter of course, it may amend 'with the [. . .] the court's leave' [and] [t]he court 'should freely give leave when justice so requires.'" *Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008) (quoting Fed. R. Civ. P. 15(a)(2)). "Courts must freely give leave to amend under Rule 15(a) where interests of justice so require." *Illumination Management Solutions, Inc. v. Ruud*, No. 10–C–1120, 2012 WL 6060967, at *2 (E.D.Wis. Dec. 6, 2012) (citation modified); *see also Soltys*, 520 F.3d at 742–43.

"The 'free to give leave' standard 'reflects a liberal attitude towards the amendment of pleadings.'" *Estate of Bender v. Hebel*, No. 11–CV–558, 2011 WL 6148692, at *1 (E.D.Wis. Dec. 9, 2011) (quoting *Campania Mgmt. Co. v. Rooks, Pitts & Poust*, 290 F.3d 843, 848–49 (7th Cir. 2002)). "'District courts have broad discretion to deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile.'" *Illumination Management Solutions*, 2012 WL 6060967, at *2 (quoting *Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 432 (7th Cir. 2009)). Nevertheless, "[d]elay on its own is usually not reason enough for a court to deny a motion to amend." *Soltys*, 520 F.3d at 743 (citation modified).

"However, the bottom line is that, while a court may deny a motion for leave to file an

[6] Generac's Amended Answer and Counterclaims were filed on the last day of its time to amend a pleading under Rule 15, and after the Scheduling Order deadline for amending pleadings.

amended complaint [under FRCP 15(a)(2)], such denials are disfavored." *Illumination Management Solutions*, 2012 WL 6060967, at *2 (citing *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010)).

2. Leave to Amend Under Fed. R. Civ. P. 16(b)(4)

Under FRCP 16(b)(4) "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). According to the Seventh Circuit "some tension" exists between Rules 15 and 16. *Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir. 2011). FRCP 16(b)(3)(A) requires the court to "set a deadline for filing amended pleadings" in the scheduling order that they are "generally required to issue [. . .] as soon as practicable." *Id*. (citation modified).

"In making a Rule 16(b) good-cause determination, the primary consideration for district courts is the diligence of the party seeking amendment." *Id*. (citation modified); *see also* Moore's Federal Practice § 16.14[1] [b], at 16–72 (Matthew Bender 3d ed. 2010) ("[A]lthough undoubtedly there are differences of views among district judges about how compelling a showing must be to justify extending the deadlines set in scheduling orders, it seems clear that the factor on which courts are most likely to focus when making this determination is the relative diligence of the lawyer or lawyers who seek the change."). Thus, if a party moves diligently in requesting its amendment, then the good cause standard has been met. *See Alioto*, 651 F.3d at 719; *Trustmark Ins. Co. v. General & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005).

III. ARGUMENT

A. The Infringement Claims Related to Carbon Monoxide Detection Technology are Wholly Separate and Distinct From the Infringement Claims Flowing From the Asserted Patents

The Generac Patents relate, exclusively, to the detection of carbon monoxide. ECF No. 30 at ¶¶ 11, 13-32, 149-160. The Asserted Patents, however, relate to multi-fuel generator systems. ECF No. 1 at ¶¶ 11, 22, 33, 46, 59, 72, 85, 96, 107, 118, 129; ECF No. 30 at ¶¶ 33-52. Indeed, neither the Generac Patents nor the Champion Responsive Patents are related to the Asserted Patents in any way. *Compare* ECF Nos. 1-01 – 1-11 *and* Ex. 1 at pp. 54-81 *with* ECF Nos. 30-01, 30-02.

"In the patent context, '[e]ach patent asserted raises an independent and distinct cause of action,' and therefore 'infringement must be separately proved as to each patent.'" *Optis Cellular Technology, LLC v. Apple Inc.*, 139 F.4th 1363, 1375 (Fed. Cir. 2025) (quoting *Kearns v. Gen. Motors Corp.*, 94 F.3d 1553, 1555–56 (Fed. Cir. 1996)).

As this case continues, the parties will need experts to prove their cases, engage in claim construction, evaluate the accused products, put on fact witnesses, and tell the jury what happened here to explain why the elements of infringement are (or are not) met. There will be no overlap between any of the foregoing as it relates to the Asserted Patents and the Generac Patents. CO detection has nothing at all to do with the Asserted Patents and the implementation of multi-fuel in generators. The only overlap between these claims is that they involve generators generally. Different experts will be required to prove infringement, and in Generac's case, non-infringement. Different fact witnesses will be required to testify about the originally accused products, and at least the thirty-three (33) unique products Champion seeks to accuse as infringing the Champion Responsive Patents. *Compare* ECF No. 1 at ¶¶ 11, 13, 22, 24, 33, 35, 46, 48, 59, 61, 72, 74, 85, 87, 96, 98, 10, 109, 118, 120, 129, 131 *with* Ex. 1 at ¶ 17 (Counterclaims). Similarly, none of the

products accused by Generac in its Amended Answer and Counterclaims have any relation to the Asserted Patents.

Generac's new counterclaims, thus, do not "[arise] out of the same transaction or occurrence" and do not present **<u>any</u>** "common issues of law or fact." *Ribble*, 2012 WL 1413293, at *1. *See also* ECF No. 30 at ¶¶ 11, 13-32, 149-160. Indeed, those new claims can, and should, be entirely resolved on their own, without regard to the infringement claims and defenses surrounding the Asserted Patents. Resolving these cases separately allows the parties to confine disparate fields of technology to separate cases on different case management schedules.

Moreover, separating these cases prevents juror confusion when having to hear from multiple fact and expert witnesses providing scientific testimony about different products. Champion, if allowed by this Court to amend, will be accusing ***thirty-five (35)*** products, where only two overlap with the products accused in the Complaint. ECF No. 1 at ¶¶ 11, 13, 22, 24, 33, 35, 46, 48, 59, 61, 72, 74, 85, 87, 96, 98, 10, 109, 118, 120, 129, 131; Ex. 1 at ¶ 17 (Counterclaims). Generac has accused three (3) Champion products[7] of infringing "at least" two claims between the two Generac Patents. ECF No. 30 at ¶¶ 11, 13-32, 149-160. If these cases remain combined, the jury instructions will be hundreds of pages long—including separate instructions for each claim, for each patent, over a total of thirty-nine (39) disparately distributed accused products across each instruction set. *Optis Cellular Technology*, 139 F.4th at 1376 ("[T]he district court abused its discretion by asking a single infringement question covering five asserted patents. Thus, the infringement judgment is vacated.").

[7] It also seems likely that Generac will seek to add additional Champion products to its Counterclaims, beyond those currently identified by name. For example, paragraph 17 alleges "Champion has at least 106 different products listed on Champion's website that have the 'CO Shield' designation." Paragraphs 22 and 28 allege that "at least" the three referenced products infringe.

By severing these cases, the Court avoids an instance where the jury is tasked with sorting the testimony of possibly four experts offering competing testimony about the meaning of 97 claims of the asserted patents applied to ***thirty seven (37)*** different products unevenly distributed between the parties and patents. Severance to avoid that eventuality certainly falls within the broad discretion of the Court.

Therefore, Champion respectfully requests that the Court sever Generac's counterclaims related to the infringement of the Generac Patents, and (for the reasons set forth below) grant Champion leave to amend its answer to the same so that Champion can assert the Champion Responsive Patents in *that* resultant case.

B. Champion Should be Given Leave to Amend Under Either Fed. R. Civ. P. 15(a)(2), or Else 16(b)(4)

Champion should be given leave to amend its answer (ECF No. 31) to Generac's Amended Answer and Counterclaims because justice requires the amendment, Champion has not delayed in bringing this Motion, and Champion has shown good cause. Champion neither delayed in conducting its investigation, nor in bringing this Motion for leave to amend. Moreover, the Scheduling Order does not contemplate the filing of a pleading after the May 15, 2025 date set forth therein. Champion's Answer to Generac's Amended Answer and Counterclaims was due on May 29, 2025, and Champion filed it on that date. ECF No. 30; ECF No. 31.

Regardless of whether the Court grants Champion's Motion to Sever, Champion requests leave to amend, either in the newly-created severed case, or in the instant case if the Court denies Champion's Motion to Sever.

It has been less than sixty (60) days since Generac filed its Amended Answer and Counterclaims. *See* ECF No. 30. Champion filed its responsive pleading to the Amended Answer and Counterclaims thirty-five (35) days before the date of this Motion. This case is in its infancy,

the parties having just recently even agreed on a protective order. Champion's proposed-amended answer (Ex. 1) demonstrates the depth of research that was required for Champion to review the technology at issue, the products accused by Generac, its own patents, and indeed Generac's products that Champion now accuses. That depth of investigation in tandem with Champion's quick actions here show that there has not been any sort of "undue delay" that should give this Court pause under FRCP 15(a)(2), or any other dilatory behavior in bringing this Motion that should prevent Champion from amending under FRCP 16(b)(4).

The other obstacles associated with FRCP 15(a)(2) do not apply here. Champion has not acted in "bad faith," shown any "dilatory motive," or made any "repeated failure[s] to cure deficiencies." *Hukic*, 588 F.3d at 432. Moreover, the proposed amendment would not be "futile" because it provides two entirely new causes of action under which Champion seeks relief as against Generac. Champion also seeks to assert additional affirmative defenses against Generac's assertion of the Generac Patents. For example, Champion and Generac have each previously attested to PGMA, their trade organization, that they would not assert their patents related to CO detection so that the CO monitoring standards could be put in place for public safety. Ex. 1 at ¶¶ 1-4 (Defenses). Generac has not, to Champion's knowledge, enforced either of the Generac Patents since that time, giving rise to Champion's defense of equitable estoppel here. Ex. 1 at ¶¶ 1-4 (Defenses). Champion's defense is further supported by the fact that, in July of 2020, Generac identified one of the Generac Patents[8] to Champion in Generac's response to a cease-and-desist letter. Ex. 1 at ¶¶ 1-4 (Defenses). However, to Champion's knowledge, Generac never asserted that CO patent against Champion or any other company in the industry. This issue is, like the others relating to the Generac Patents, unrelated to the issues in the Complaint, and should be resolved separately.

[8] In that responsive communication, Generac's counsel identified U.S. Patent No. 10,563,596.

The proposed-amendment would also not cause any "undue prejudice" because, again, this case is in its infancy. The Parties just moved for the entry of a stipulated protective order. ECF 32; ECF 32-01. There has not been claim construction related to the Generac Patents. There has not been a single deposition conducted. This is the exact type of amendment the FRCP envision under 15(a)(2).

Champion's actions also demonstrate it met the heightened good cause standard of FRCP 16(b)(4). Champion did not delay in bringing this Motion, which is the key inquiry in the analysis under FRCP 16(b)(4). *Alioto*, 651 F.3d at 719. Champion thus respectfully requests that this Court grant Champion leave to amend its answer to Generac's Amended Answer and Counterclaims, whether under FCRP 15(a)(2) or under 16(b)(4), and whether in this case, or in the newly-severed case.

IV. CONCLUSION

For the reasons set forth above, Champion respectfully requests that this Court either: (1) sever Generac's counterclaims arising out of the Generac Patents (ECF No. 30 at ¶¶ 11, 13-32, 149-160) with the directive that Champion will be able to file the amended answer attached hereto as Exhibit 1 to assert the Champion Responsive Patents as against Generac; or (2) in the alternative, allow Champion leave to file an amended answer to Generac's Amended Answer and Counterclaims in order to assert the Champion Responsive Patents in the instant case.

Dated this 3rd day of July, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2025, I caused the foregoing to be filed electronically with the Clerk of the Court, and therefore served upon all counsel of record.

/s/ Jennifer E. Hoekel