

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

BTL INDUSTRIES, INC.,

Plaintiff,

v.

Case No: 6:22-cv-1477-WWB-EJK

NEXTWELLNESS USA LLC,

Defendant.

ORDER

This cause comes before the Court on Defendant Nextwellness USA LLC's Motion for Leave to File a Third-Party Complaint (the "Motion") (Doc. 78), filed October 16, 2023. Plaintiff responded in opposition on October 26, 2023. (Docs. 79; 85 (unsealed filing).) The Motion is due to be denied without prejudice.

This is a patent and trademark infringement action wherein Plaintiff brings a number of claims against Defendant for infringing on several of Plaintiff's patents related to its EMSCULPT® aesthetic body-contouring device. (Doc. 9.) Defendant now moves for leave to file a third-party complaint against CTN Cryotech Plc, an Irish Public Limited Company ("CTN"). (Doc. 78.) Defendant asserts that CTN has a duty to defend and indemnify Defendant for Plaintiff's claims because CTN is the manufacturer of Defendant's allegedly infringing body-contouring device. (*Id.* at 1.) Thus, Defendant seeks leave to bring CTN into this case "in the interest of fairness to all parties, avoiding inconsistent results, and judicial economy." (*Id.*) Plaintiff opposes

Defendant's Motion, asserting that the Motion is untimely and without good cause. (Doc. 85.)

The CMSO can be modified "only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). "When a deadline appears in a scheduling order and a motion is filed after the deadline, 'Rule 16 is the proper guide for determining whether a party's delay may be excused.'" *Destra v. Demings*, 725 F. App'x 855, 859 (11th Cir. 2018) (unpublished) (quoting *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418 n.2 (11th Cir. 1998)). "This good cause standard precludes modification unless the schedule cannot 'be met despite the diligence of the party seeking the extension.'" *Sosa*, 133 F.3d at 1418 (quoting Fed. R. Civ. P. 16 advisory committee's note).

The deadline to add parties or amend pleadings was February 15, 2023, eight months before the Motion was brought. (Doc. 39.) However, Defendant asserts that the delay in bringing this motion results from good cause. (Doc. 78 at 5.) It explains:

Rather than complicate the litigation without reason, Defendant has labored at length to work a background agreement with CTN directly to address potential liability in this matter. In fact as late as last week the Defendant's entire corporate leadership team flew to Finland to meet with CTN to discuss these issues. Those meetings resulted in an impasse

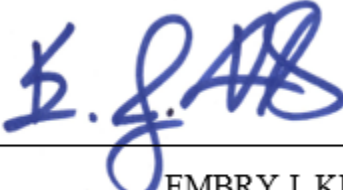
(*Id.*)

In light of the existing deadlines in the Case Management and Scheduling Order ("CMSO") (Doc. 39), the Motion is due to be denied without prejudice. Fact discovery closes on December 1, 2023, and expert discovery closes on January 19, 2024. (*Id.* at 2.) Thus, even if Defendant has established good cause for its untimely motion to add

CTN as a third-party, which the Court does not decide at this time, there is insufficient time to do so under the current case deadlines, and modifying the discovery deadlines would require moving the dispositive motions deadline (March 5, 2024), and consequently, the trial term (August 4, 2024). (*Id.*) While Defendant emphasizes that the Motion is being brought ten months before the trial term, what Defendant may not appreciate is that the Court requires adequate time for discovery to close, summary judgment and *Daubert* motions to be prepared, filed, and responded and replied to, and for the Court to review and rule on those motions, all in advance of the trial. In that vein, the CMSO states that the Court grants motions to extend the trial term only upon a showing of manifest injustice, which Defendant has not demonstrated. (*Id.* at 5.)

Accordingly, it is **ORDERED** that Defendant, Nextwellness USA LLC's Motion for Leave to File a Third-Party Complaint (Doc. 78) is **DENIED WITHOUT PREJUDICE**. A renewed motion, should Defendant choose to bring one, must address the remaining deadlines in the CMSO and present a realistic timeline for serving and engaging in discovery with CTN.

DONE and **ORDERED** in Orlando, Florida on November 29, 2023.



EMBRY J. KIDD
UNITED STATES MAGISTRATE JUDGE