

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

AMPRO COMPUTERS, INC., a California	)	
corporation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 13-1937-LPS
	)	
LXE, LLC, a Delaware limited liability	)	REDACTED -
company, METROLOGIC INSTRUMENTS,	)	PUBLIC
INC. d/b/a HONEYWELL SCANNING AND	)	VERSION
MOBILITY, a New Jersey Corporation, and	)	
DOES 1-10, inclusive,	)	
	)	
Defendants.	)	

**MEMORANDUM ORDER**

At Wilmington this 1st day of July, 2016:

Pending before the Court are Ampro Computers, Inc.'s ("Ampro" or "Plaintiff") Motion for Partial Relief from the Court's September 9, 2015 Order ("Motion for Partial Relief") (D.I. 57); Ampro's Motion for Leave to File Second Amended Complaint ("Motion for Leave") (D.I. 59); and LXE, LLC ("LXE"), Metrologic Instruments, Inc. ("Metrologic") d/b/a/ Honeywell Scanning and Mobility ("HSM"), and Does 1-10's ("Does") (together, "Defendants") Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 11 (D.I. 93). Having reviewed the parties' letters and briefing on the motions (D.I. 57-1, 59-1, 65, 68, 83, 84, 94, 99, 105) and heard oral argument on April 26, 2016 (*see* Transcript ("Tr.")), **IT IS HEREBY ORDERED** that all three motions (D.I. 57, 59, 93) are **DENIED**.

1. This case involves a dispute stemming from a Development Services Agreement ("DSA"), International Manufacturing and Production Agreement ("IMPA"), and Statement of

Work (“SOW”) (collectively, “the Agreements”), which together amounted to a requirements contract between Ampro and LXE for Ampro-designed and manufactured carrier boards for LXE’s next line of vehicle-mounted computers, Thor® VX8C and Thor® VX9C (collectively, “VX8/9C”). (See D.I. 51 at 1-4) On September 9, 2015, the Court granted Defendants’ Partial Motion to Dismiss for Failure to State a Claim for breach of contract and denied Ampro’s second request for leave to amend. (*Id.* at 13-14; D.I. 52) Finding that, “[i]mportantly, there are no allegations that Defendants ever purchased or sought to purchase the Carrier Boards elsewhere, or took any steps to fulfill their requirements from any source other than Plaintiff” (D.I. 51 at 4; *see also id.* at 10), the Court concluded that “[n]o amended pleading could alter the contractual relationship among the parties,” i.e., a requirements contract for a component for which Defendant had no requirements<sup>1</sup> (*id.* at 13-14). Ampro filed its Motion for Partial Relief and Motion for Leave to Amend on October 22, 2015, based on “newly discovered evidence” which Ampro contends provides support for a breach of contract claim arising from Defendants’ alleged bad faith in fulfilling their requirements. (D.I. 57, 59) Defendants filed their Motion for Sanctions on December 28, 2015, contending that Ampro’s motions were frivolous. (D.I. 62)

2. Ampro’s Motion for Partial Relief asks the Court for relief from the September 9, 2015 ruling that, because Ampro could not show that Defendants were obtaining their requirements under the IMPA from a third party, Ampro had not stated a claim for breach of contract. (See D.I. 51 at 13-14) Ampro points to “newly discovered evidence” that Defendants did actually have requirements under the IMPA but fulfilled them from Intermec, which Ampro

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<sup>1</sup>The Court set out a detailed factual background in its September 9, 2015 Memorandum Opinion, which it does not repeat here. (See D.I. 51 at 1-4)

recently discovered has been owned by HSM (the company name under which LXE does business) since 2013. (*See* D.I. 57-1 at 6-7) According to Ampro's proposed Second Amended Complaint, "on or about March 23, 2015, Plaintiff discovered that Defendants had new products posted on their website, one of which is entitled the 'VM3.'" (D.I. 59 Ex. A at ¶ 55) In its briefing, Ampro modifies the date on which it claims to have discovered Defendants' new products, explaining that it discovered the VM3 on September 17, 2015 "without the benefit of any discovery in this case," adding that "within one month [thereafter] Plaintiff i) analyzed the product, ii) worked backwards to discover Intermec's role in this entire matter, and iii) prepared and filed these Motions." (D.I. 57-1 at 5, 11)

3. Ampro initially brought its Motion for Partial Relief pursuant to Federal Rule of Civil Procedure 60(b)(2), which provides for relief from final judgments on the basis of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." However, in its briefing, Ampro suggests that Federal Rule of Civil Procedure 54(b) – which provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities" – might be a better vehicle for granting the relief requested, given that the Court's September 9, 2015 Order was not a final judgment. Under Rule 54(b), "[r]econsideration of a previously decided issue may . . . be appropriate . . . when the record contains new evidence . . . if the new evidence differs materially from the evidence when the issue was first decided . . . ." *Speeney v. Rutgers, The State Univ.*, 369 F. App'x 357, 361 (3d Cir. 2010) (internal citations and quotation marks omitted). "While the standards articulated in

Rule[] . . . 60(b) are not binding in an analysis of Rule 54(b) motions, courts frequently look to these standards for guidance in considering such motions.” *Cezair v. JP Morgan Chase Bank, N.A.*, 2014 WL 4955535, at \*1 (D. Md. Sept. 30, 2014) (internal citation omitted). A party is only entitled to relief under Rule 60(b) if newly discovered evidence (1) is material and not merely cumulative, (2) could not have previously been discovered through the exercise of reasonable diligence, and (3) would have likely changed the outcome. *See Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991). Independent of Rules 54(b) and 60(b), Local Rule 7.1.5 further requires that any motions for reargument “be filed within 14 days after the Court issues its opinion or decision.” Del. L.R. 7.1.5.

4. The Court is not persuaded that Ampro’s purported “newly discovered evidence” – of the requirements under the Agreements being fulfilled by Intermec’s VM3 product – could not have been discovered through reasonable diligence well before the Court issued its September 9, 2015 Memorandum Opinion and Order, as this information was publicized and indisputably available as early as March 23, 2015 on HSM’s website and in press releases. (*See* D.I. 66 at ¶ 6 & Ex. E; D.I. 59 Ex. A at ¶ 55) Although there is no bright-line rule for when this evidence should have been found or how it should have been brought to the Court’s attention earlier, Ampro offers no excuse for why it did not discover the “new evidence” until September 17, 2015, several months after it was publicly available and eight days after the Court issued its Memorandum Opinion and Order granting Defendants’ Partial Motion to Dismiss (on the basis of the materials then before the Court). *See generally Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (finding that under applicable local rules “district court appropriately did not consider the affidavit in its disposition of the motion for reconsideration” when party “filed only

his own affidavit containing evidence that was available prior to the summary judgment”). It appears that Ampro did not begin to work diligently toward discovering its new evidence until after the Court had granted Defendants’ Partial Motion to Dismiss. (Tr. at 24) (“Once the Court’s order came out, we again realized that the case was going to start again and decided, yes, it’s time to look again.”) That it “found” the evidence of the new products on Defendants’ websites within eight days of beginning to carefully look suggests that it could have found that same information many months earlier, had it been looking diligently for it sooner.

5. Notably, Ampro’s representation that it did not discover the new products on HSM’s website until September 2015 is contrary to its own allegations in its proposed Second Amended Complaint. (See D.I. 59 Ex. A at ¶ 55) There Plaintiff alleges: “It would have all remained a secret, except that *on or about March 23, 2015, Plaintiff discovered* that Defendants had new products posted on their website, one of which is entitled the VM3.” (*Id.*) (emphasis added) This statement is naturally read as alleging that Plaintiff discovered the new products on Defendants’ website on or about March 23, 2015, a factual allegation the Court is obligated to take as true. Plaintiff’s explanation (in briefing and at the hearing) that what it really meant was that it only discovered many months later – in September 2015 – that the new products had been posted on Defendants’ website as early as March 23, 2015 is difficult to accept in light of the unambiguous allegation in its own proposed Second Amended Complaint. (See, e.g., D.I. 84 at 5 n.4; Tr. at 8-10, 23-25) Even if the Court did reject the truth of the proposed Second Amended Complaint’s allegation in favor of crediting Plaintiff’s later, contrary representations in briefing and at the hearing, that would merely shift the problem for Plaintiff from having had actual knowledge in March 2015 to having had constructive knowledge by that date. At minimum, by

late March 2015, Plaintiff knew or should have known of the purported “new evidence” on which it presses its motion, as reasonable diligence in that timeframe would have revealed the information on HSM’s website. Given the public availability of HSM’s website, the fact that the parties were in ongoing litigation, the pendency of Defendants’ Motion to Dismiss, and the fact that Plaintiff (by its own admission) discovered the “new evidence” after no more than eight days of searching (following the Court’s issuance of its September 9, 2015 Opinion), the Court concludes that Plaintiff has failed to demonstrate it acted with reasonable diligence.<sup>2</sup>

6. Other information in the record further supports the Court’s conclusions. First, Defendants point out that Ampro was in attendance at a trade show where HSM introduced the VM3 in approximately March 2015. (Tr. at 39-41; *see also* D.I. 66 Ex. E) Second, Ampro claims to have discovered the VM3 product on the same day – September 17, 2015 – that Defendants’ counsel met and conferred with Ampro’s counsel and told Ampro’s counsel that Defendants had “no interest in settling.” (Tr. at 37-38) These are further indications that acting with reasonable diligence in and around March 2015 would have resulted in discovery of the VM3 product well before September 17 (assuming, again, that Plaintiff did not actually discover the VM3 in March 2015, contrary to the allegations of the proposed Second Amended Complaint).

7. Ampro’s unexplained lack of reasonable diligence in discovering publicly available information is sufficient grounds on which to deny its Motion for Partial Relief,

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<sup>2</sup>Assuming Plaintiff did not have actual knowledge of the VM3 product until September 2015, it may be that, subsequent to that date, Ampro acted diligently in determining that the VM3 product was “virtually identical” to the ones which Defendants agreed to purchase from Ampro under the Agreements. (*See* D.I. 100 at ¶¶ 4-9) Even if so, this later diligence does not retroactively excuse the lack of reasonable diligence that preceded it.

leave to amend (D.I. 51 at 13-14). In this context, the Court finds that Ampro's more than six-month delay *after the VM3 product was listed on HSM's website* amounts to undue delay in seeking leave to amend.<sup>4</sup> Additionally, Ampro's undue delay would prejudice Defendants, who would have to relitigate the issues already resolved in their favor in connection with their Partial Motion to Dismiss (based on a record that at the time Ampro was content for the Court to rely on in resolving that motion) – issues on which Defendants rightly assumed that they had prevailed on (at least in this Court).

11. Although the Court denies Ampro's motions, the motions are not so frivolous as to constitute sanctionable conduct under Federal Rule of Civil Procedure 11. "Rule 11 provides that attorneys may be sanctioned if they, among other things, fail to make a reasonable inquiry into the legal legitimacy of a pleading." *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 297 (3d Cir. 2010) (citing Fed. R. Civ. P. 11(b)(2) & (c)). "[T]he rule is meant to be applied sparingly to deter parties from filing baseless actions or frivolous motions." *Vehicle Operation Techs. LLC v. Am. Honda Motor Co. Inc.*, 67 F. Supp. 3d 637, 649 (D. Del. 2014) (citing *Doering v. Union Cnty. Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988)). "Rule 11 sanctions are generally disfavored unless the misconduct by the party and/or attorneys is extraordinary. . . . [T]he appropriate analysis is whether [Plaintiff's] and [its] attorneys' conduct was objectively reasonable, and whether they complied with their affirmative duty to conduct a reasonable investigation." *McGown v.*

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<sup>4</sup>Because the Court is denying Ampro's Motion for Leave to Amend on account of undue delay by Ampro and prejudice to Defendants, it need not reach the issue of the futility of Ampro's proposed amended pleading. In connection with Defendants' Rule 11 motion (see below), the Court concludes that Ampro's allegations rise at least above the level of being frivolous.

*Silverman & Borenstein, PLLC*, 2014 WL 545963, at \*2 (D. Del. Feb. 7, 2014).

12. Ampro's interpretation of the Agreements – that they are not limited to products actually manufactured by Ampro – is not frivolous. Defendants' sourcing of requirements meeting the specifications under the Agreements, whether or not made by Ampro, may be relevant to consideration of whether Defendants acted in bad faith in fulfilling their requirements under the Agreements. (*See* D.I. 99 at 11) (“[T]he more sensible interpretation of the parties’ agreement is that Defendants sought to buy products, including the carrier board, that matched certain specifications.”) The Court also agrees with Ampro that a comparison of the VX8/9C specifications and VN3 product does not clearly lead to a conclusion that they are materially different. Indeed, the parties’ experts disagree on whether the many differences between the VX8/9C and VM3 are material.<sup>5</sup> The Court need not resolve this complex factual dispute in order to conclude that Plaintiff’s allegations are not frivolous.

13. To the contrary, it is apparent from the relevant drawings and specifications provided to the Court that Ampro’s proposed amended pleading reflects a reasonable investigation of the merits by Plaintiff’s counsel prior to filing its motions. (*See* D.I. 69 at ¶¶ 3-8; D.I. 69 Ex. C; D.I. 57-1 at 2-3; D.I. 59 Ex. B; D.I. 88 at Ex. B; D.I. 57-3 at ¶ 3; D.I. 100 at

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<sup>5</sup>*Compare, e.g.*, D.I. 105 at 6 (“For instance, the table in Mr. Witten’s declaration comparing the VM3 to the VX9C identifies several differences between the two computers (*e.g.*, different CPU, different USB port configurations, different number of ‘COM ports,’ different ‘Ethernet Ports,’ and different Windows operating systems) and ignores yet others altogether (including the different environmental sealing and different mounting interface). Mr. Munch likewise concedes in his declaration that the VX8/9C’s specifications required a two-board approach of a ‘COM Express’ module plus a custom ‘Carrier Card,’ as opposed to the VM3’s ‘motherboard’ where the principle computing architecture (*e.g.*, memory, control logic, and interfaces) are on a single printed carrier board.”) *with* D.I. 99 at 12 (“Even the technical drawing Defendants submitted in its answering brief to the Pending Motions matches the VX8/9C technical drawing in the SOW.”).

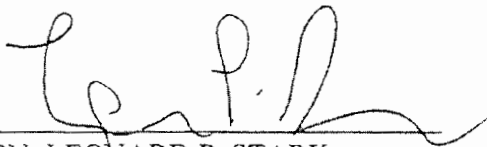


¶¶ 4-9) The record reveals that, before filing its motions, Ampro and/or its attorneys undertook technical research and analysis, interviews of technical and sales personnel, a feature-by-feature comparison of products, legal analysis of the Agreements, and research of public filings. (*See id.*) In light of the totality of circumstances, Plaintiff's conduct in filing its pending motions is not sanctionable.

14. Nor are Defendants' allegations that the proposed Second Amended Complaint makes irrelevant allegations regarding HSM's corporate structure, intended to cause "reputational smear" (*see* D.I. 105 at 8; *see also* D.I. 94 at 9; Tr. at 55-57, 80-81), sufficient to impose sanctions under Rule 11. The Court is not persuaded that allegations regarding HSM's corporate structure are entirely irrelevant to Ampro's breach of contract claim. *See generally Ario*, 618 F.3d at 297 ("Rule 11 . . . should not be applied to adventuresome, though responsible, lawyering which advocates creative legal theories." ) (internal quotation marks omitted).

**IT IS FURTHER ORDERED** that because this Memorandum Order is filed under seal, the parties shall meet and confer and shall, no later than **July 6, 2016**, provide the Court with a proposed redacted version of this Memorandum Order. Thereafter, the Court will issue a publicly-available version of this Memorandum Order.

**IT IS FURTHER ORDERED** that no later than **July 8, 2016**, the parties shall provide the Court with a joint status report.

  
HON. LEONARD P. STARK  
UNITED STATES DISTRICT JUDGE