

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

TG PLASTICS TRADING CO., INC. :  
d/b/a NATIONAL PLASTICS :  
TRADING CO. :  
 :  
v. : C.A. No. 09-336M  
 :  
TORAY PLASTICS (AMERICA), :  
INC. :

**MEMORANDUM AND ORDER**

Plaintiff TG Plastics Trading Co., Inc. (“TG Plastics”) moves pursuant to Rule 15 of the Federal Rules of Civil Procedure for leave to amend its Complaint a second time to add two new counts – breach of the covenant of good faith and fair dealing (Count V) and negligent misrepresentation (Count VI) – and to expand its breach of contract claim (Count I) to allege a failure to forward sales leads.<sup>1</sup> (Document No. 92). Defendant Toray Plastics (America), Inc. (“Toray”) opposes the Motion, primarily on the grounds that the Motion is untimely and, if permitted, will expand the scope of the case and further delay discovery. (Document No. 101).

Rule 15(a)(2) directs courts to “freely give leave when justice so requires.” While there is a liberal amendment policy, leave to amend is not granted in all cases. See Invest Almaz v. Temple-Inland Forest Prods. Corp., 243 F.3d 57, 71 (1<sup>st</sup> Cir. 2001). The Court may deny a motion to amend where there is undue delay on the part of the movant or undue prejudice to the opposing party if the amendment is allowed. Torres-Alamo v. Puerto Rico, 502 F.3d 20, 25-26 (1<sup>st</sup> Cir. 2007); Acosta-Mestre v. Hilton Int’l of Puerto Rico, Inc., 156 F.3d 49, 51 (1<sup>st</sup> Cir. 1998). If considerable time has

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<sup>1</sup> At the hearing, Plaintiff’s counsel withdrew the request to amend to add the failure to forward sales leads claim.

passed between the filing of the complaint and the motion to amend, then the movant bears the burden of demonstrating a valid reason for the neglect and delay. Acosta-Mestre, 156 F.3d at 52 (quoting Stepanischen v. Merch. Despatch Transp. Corp., 722 F.2d 922, 933 (1<sup>st</sup> Cir. 1983)).

Although this case was filed in July 2009, TG Plastics was granted leave to amend to assert new claims in July 2011. (Document No. 43). The Court concluded that TG Plastics' delay in seeking leave to amend was excused, in part, by the parties' early efforts at settlement and that Toray was not unfairly prejudiced by the amendment. Id.

Several months later and approaching the close of discovery, TG Plastics again seeks leave to expand its Complaint and add new claims. Given the additional passage of time and the progress made in discovery, the burden on TG Plastics to demonstrate a valid reason for the delay is higher now than it was last July. See Steir v. Girl Scouts of the USA, 383 F.3d 7, 12 (1<sup>st</sup> Cir. 2004) (the burden on a party seeking to amend becomes "more exacting" as the case nears trial). Further, although TG Plastics was granted leave to amend several months ago, the Court did so despite being "somewhat troubled by the timing of the motion and cognizant that the discovery period may need to be extended." (Document No. 43 at p. 3).

Here, I am also troubled by the timing of TG Plastics' Motion and unwilling to allow new claims at this late stage that will require significant additional discovery and further delay this case without a strong justification for the late timing of the request. See Acosta-Mestre, 156 F.3d at 52 (undue delay is a sufficient basis for denying leave to amend "especially where allowing the amendment will cause further delay in the proceedings").

First, as to proposed Count V, it alleges a breach of the covenant of good faith and fair dealing. Under Rhode Island law, "virtually every contract contains an implied covenant of good

faith and fair dealing between the parties.” Dovenmuehle Mortg., Inc. v. Antonelli, 790 A.2d 1113 (R.I. 2002). “Claims for breach of the covenant of good faith sound in contract, not in tort.” Hord Corp. v. Polymer Research Corp. of Am., 275 F. Supp. 2d 229, 237 (D.R.I. 2003). “The covenant of good faith is regarded as a counterpromise that the promisee will act in a manner consistent with the purposes of the contract.” Id. While not every breach of contract involves a breach of the covenant of good faith and fair dealing, the claims are generally plead in parallel since every breach of the covenant implies a breach of contract. Id. (citing Ross-Simons of Warwick, Inc. v. Baccarat Inc., 66 F. Supp. 2d 317, 330 (D.R.I. 1999)).

Here, TG Plastics alleges that Toray breached the covenant by misusing its discretion under the Settlement Agreement to classify product and determine what product to recycle internally or sell directly to customers rather than sell to TG Plastics. This claim directly relates to TG Plastics’ existing breach of contract claim that Toray has “refused or failed to exclusively sell” it the product covered by the Settlement Agreement. (Document No. 44 at ¶ 33). It is not a “new” allegation in this case and does not expand the issues in dispute. Thus, it will not result in a new wave of discovery and will not further delay this case. Accordingly, TG Plastics is granted leave to amend to add Count V.<sup>2</sup>

Second, as to Count VI, it alleges negligent misrepresentation. Under Rhode Island law, a negligent misrepresentation claim includes “the following elements: (1) a misrepresentation of a

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<sup>2</sup> At the hearing, Toray’s counsel forecast that his client would move to dismiss Count V if leave to amend was granted. However, I am at a loss as to how Toray could do so in good faith under these circumstances. First, my preliminary review of Count V and applicable Rhode Island law suggests that TG Plastics has sufficiently stated at least a plausible GFFD claim. (See Document No. 112 at pp. 5-6). Second, Toray’s position on Count V appears to be inconsistent with its successful defense of its own GFFD claim against TG Plastics. Under these circumstances and considering the applicable pleading standard embodied in Rule 12(b)(6), a motion to dismiss Count V strikes me as an unproductive use of resources.

material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.” Mallette v. Children’s Friend and Serv., 661 A.2d 67, 69 (R.I. 1995).

Here, TG Plastics alleges that, during the negotiations leading to the 2007 Settlement Agreement, Toray provided it with certain sales charts that contained “numerous material misrepresentations of fact” and that it relied upon the sales charts to its detriment in entering into the Settlement Agreement.

TG Plastics alleges that it was not until Mr. David Jose, Toray’s CFO, admitted in his deposition on February 1, 2012 that it was careless of him to send the sales charts to TG Plastics which included “B-Grade” sales that TG Plastics had the factual background to allege a negligent misrepresentation claim. (Document No. 92 at p. 13). Thus, it argues that its Motion to Amend is timely, as it is based upon newly discovered evidence. Id. Toray disputes that this is a “newly discovered claim” and argues that TG Plastics has been “in possession of the emails with the so-called ‘sales charts’ that form the basis of the negligent misrepresentation claim since 2007.” (Document No. 101 at p. 15).

Since the sales chart emails were sent from Toray to TG Plastics in 2007, it is obvious that they have been in TG Plastics’ possession since 2007. However, that begs the question. The issue is not when TG Plastics received the sales charts but rather when it learned of sufficient facts to support a negligent misrepresentation claim related to the sales charts.

Here, TG Plastics has sufficiently shown that its negligent misrepresentation is based upon information recently learned in discovery to warrant its late request to amend. For instance, on January 26, 2012, Toray produced an internal email to TG Plastics which is dated November 1, 2007 and from Mr. Jose to Mr. Schloesser discussing the so-called sales charts. The email indicates that Mr. Goderstad was looking for an “updated list” and “[t]he issue might be the categorization of the B-grade. I think it was included in the original report that was sent to him as B-grade/C-grade/scrap sales.” (See Bates No. T0912). When questioned about this topic at his deposition, Mr. Jose testified on February 1, 2012 that it was “a little careless” “in hindsight” of him to have included B-grade information in the sales charts sent to Mr. Goderstad and that it was “probably careless of [him] not to review that report before [he] sent it out to [Mr. Goderstad].” While the parties dispute the import of this testimony and the Court is reaching no conclusions as to whether any misrepresentation (negligent or otherwise) occurred, TG Plastics has sufficiently stated a claim of negligent misrepresentation and identified arguably relevant evidence regarding such claim which was recently uncovered in discovery and justifies granting leave to amend at this late stage.

### **Conclusion**

For the foregoing reasons, TG Plastics’ Motion for Leave to Amend (Document No. 92) is GRANTED in part and DENIED in part. In particular, TG Plastics is granted leave to amend to assert proposed Count V (breach of covenant of good faith and fair dealing) and Count VI (negligent misrepresentation). However, TG Plastics is denied leave to assert any new claims or factual allegations regarding the alleged failure to forward sales leads, and it is denied leave to amend to otherwise revise its allegations as to the descriptions of its business operations and the claims and factual allegations regarding the fundamental dispute over the scope of product covered by the

Settlement Agreement. TG Plastics has shown no good reason for these late revisions and no good reason why it did not seek leave to make these changes earlier in connection with its First Amended Complaint. TG Plastics shall file a Second Amended Complaint in strict conformity with this Order within fourteen days.

SO ORDERED

/s/ Lincoln D. Almond  
LINCOLN D. ALMOND  
United States Magistrate Judge  
March 30, 2012