



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STAPLES, INC.)
)
Plaintiff/Counterclaim)
Defendant,)
)
v.)
)
THOMAS COOK, in his capacity as the)
Secretary of Finance for the State of)
Delaware; PATRICK T. CARTER, in his)
capacity as the Director of the Division of)
Revenue for the State of Delaware; MARK)
UDINSKI, in his capacity as the Director/)
State Escheator of the State of Delaware)
and the DEPARTMENT OF FINANCE,)
DIVISION OF REVENUE FOR THE)
STATE OF DELAWARE,)
)
Defendants/Counterclaim)
Plaintiffs.)

C.A. No. 5447-VCS

**REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR LEAVE TO FILE
SUPPLEMENTAL COUNTERCLAIM**

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PRELIMINARY STATEMENT

Staples' opposition to the State Escheator's motion to supplement the pending counterclaims is a waste of this Court's time, and an unjustified burden on the State and its already strained judicial resources. Staples has no legitimate basis to oppose the State Escheator's motion (the "Motion"), and the arguments advanced in its opposition brief (the "Opposition Brief"¹) are frivolous. First, the State Escheator has not "inexcusably delayed" presenting these new claims to the Court. The State tried to work with Staples, but Staples stonewalled the examination (the "Examination") process leaving the State Escheator with no choice but to seek leave to file the proposed supplemental counterclaim (the "Supplemental Counterclaim"). Second, Staples will suffer absolutely no prejudice if the State Escheator's Motion is granted, and Staples' arguments to the contrary are based on a plain misrepresentation of the record. Despite Staples' assertion to the contrary, this case is at the beginning process of discovery, and Staples recently had to ask the State Escheator and his counsel to return almost 5,000 pages of documents its counsel produced because the production apparently included many privileged materials (aside from that production, Staples has produced just over 1,000 pages in total). Staples still has not replaced that production, nor has it produced a privilege log detailing the myriad documents that necessitated the "claw-back." So Staples' argument that it would somehow be prejudiced if the Court granted the State Escheator's Motion is absolutely baseless.

The State Escheator's Counterclaim and his proposed Supplemental Counterclaim seek one thing: Staples's compliance with the Escheat Statute. For the past five-plus years, the State and its auditor, Kelmar Associates LLC ("Kelmar"), have been examining Staples' books and records to determine whether Staples paid its actual abandoned and unclaimed property liability for prior years to the State of Delaware. Already, the State has determined that Staples failed to

¹ Citations in the form "Opp. at ___" are to the Opposition Brief.

pay more than \$2 million in abandoned accounts payable (“AP”) and payroll (“PR”). Based on Staples’ continued failure to pay those amounts, and on Staples’ decision to sue the State, the State Escheator was forced to file his Counterclaim in this Court seeking to enforce the State’s request for payment. Now, eight months later, Staples has effectively stonewalled the State’s efforts to complete its Examination and determine Staples’ past liability to the State, if any, for abandoned gift certificates and merchandise credits (collectively “GC/MC”), accounts receivable credits (“AR Credits”), and rebates. Consequently, the State Escheator now seeks to supplement his Counterclaim so that the State and its auditor can complete the Staples Examination that began more than five years ago.

In opposing the Motion, Staples asks this Court to require the State Escheator to file his supplemental claims in a different court, while all but conceding that that lawsuit – to the extent it yields documents demonstrating Staples has failed to pay unclaimed GC/MC, AR Credits, and rebates – will ultimately generate essentially identical claims by Staples challenging the State’s authority under the Escheat Statute and the statute itself. *See* Opp. at 3 n.2. (“Staples welcomes the opportunity to defend itself against [the State Escheator’s] New Counterclaim, provided Staples can do so in a separate lawsuit”); *id.* at 9, n.4. (indicating that Staples would challenge the “legality of the demand for payment” for “AR Credits, gift certificates and rebates.”). By contrast, the State Escheator asks the Court to grant his Motion so that the parties can efficiently resolve all issues concerning the Examination in one action.

ARGUMENT

I. STAPLES HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT THE STATE ESCHEATOR “INEXCUSABLY DELAYED” SUPPLEMENTING HIS COUNTERCLAIM AND THAT STAPLES WILL BE PREJUDICED AS A RESULT

As explained in the State Escheator’s Motion, leave to file a supplemental pleading “should be freely granted and can be denied only if the plaintiff inexcusably delayed making its

request *and* the defendant is prejudiced as a result.” *BabyAge.com, Inc. v. Weiss*, 2009 WL 3206487, at *1 (Del. Ch. Oct. 1, 2009) (emphasis in original) (citing *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 668 F. Supp. 906, 922 (D. Del. 1987)); Motion at ¶ 2. Moreover, “[t]his exception to the general rule permitting liberal amendment is *narrowly construed*,” as “Rule 15(d) is a highly permissive standard.” *Agilent Technologies, Inc. v. Kirkland*, 2009 WL 119865, at *5 (Del. Ch. Jan. 20, 2009) (emphasis added) (quoting *Parnes v. Bally Entm’t Corp.*, 2000 WL 193112, at *2 (Del. Ch. Feb. 8, 2000)). Staples has demonstrated *neither* the requisite inexcusable delay *nor* the requisite prejudice to warrant this Court abandoning the “general rule.”²

A. THE STATE ESCHEATOR’S MOTION IS TIMELY AND GRANTING HIS MOTION WILL ENABLE THE STATE TO COMPLETE ITS UNCLAIMED PROPERTY EXAMINATION OF STAPLES

Staples argues that this suit has been pending for a year and the State Escheator’s supplemental counterclaim will delay resolution of this case, thus prejudicing Staples. According to Staples, “the parties have almost completed written discovery . . . [,] will be preparing to take depositions shortly,” and “[i]f [the State Escheator] is permitted to add the proposed New Counterclaim, a resolution of the existing claims will be delayed significantly.” Opp. at ¶ 15. Not only is Staples’ characterization of the status of this case inaccurate, but rather than delaying resolution of this case, granting the State Escheator’s Motion will promote efficient resolution – in one action – of all claims related to the State’s Examination of Staples.

As an initial matter, Staples mischaracterizes the status of this case. This case is in the early stages of discovery. While the parties have propounded and responded to written discovery,

² Staples has not even argued, as it must, that the State Escheator’s Motion is the product of inexcusable delay. While Staples notes that a court will disallow an amendment or supplement “where there is evidence of undue delay, bad faith or dilatory motive” (Opp. at ¶12), Staples has not asserted, nor could it, that the State Escheator’s Motion is the product of such impermissible conduct.

thus far, that is all that has happened. And even *that* process is not yet complete. Indeed, Staples' assertion that it "has answered all of the written discovery served upon it and produced its documents [and] . . . [a]ll that remains is Staples' production of its privilege log," is simply incorrect. Opp. at ¶ 7. Until last month, Staples had produced *just a little over 1,000 pages of documents* in response to the State's first set of document requests, which were served on Staples in October 2010. See generally March 14, 2011 Letter from B. Rostocki to M. Barry, attached to the Declaration of Ned Weinberger In Support Of The State Escheator's Motion For Leave To File Supplemental Counterclaim ("Weinberger Decl.") as Exhibit A.; cf. D.I. 26 (Notice and Certificate of Service of Defendants' and Counterclaim Plaintiff's First Request for Production of Documents to Plaintiffs, dated Oct. 8, 2010). Meanwhile, for example, the State's auditor, Kelmar, a non-party, has produced approximately 20,000 pages of documents in response to Staples' subpoena, and is prepared to produce an additional 1,400 pages of documents, the production of which the State has agreed to facilitate. Moreover, in March 2011, while Staples finally produced approximately 4,700 pages of additional documents (Weinberger Decl., Ex. A), on April 14, 2011, the very day Staples filed its Opposition Brief, Staples had to retract its March production in order for Staples to re-review documents for privilege and attorney work-product protection. See Weinberger Decl., Ex. B (April 2011 Email Communications between M. Barry and B. Rostocki). Presently, Staples has not re-produced those documents. Therefore, Staples' assertion that "[a]ll that remains is Staples' production of its privilege log," is plainly inaccurate. Moreover, neither party has noticed, let alone taken, a single deposition. Far from delaying resolution of this case, granting the State Escheator leave to file his Supplemental Counterclaim will ensure the efficient resolution of all claims related to the State's Examination of Staples in one action.

Staples argues that if the State Escheator’s Motion is granted and the State secures the records it now seeks from Staples, “Defendants would then presumably make another demand for payment for the remaining property types, which would result in additional claims, discovery and an inevitable delay of trial in this case.” Opp. at ¶ 15. Critically, however, and fatal to its argument, Staples later concedes that “If Defendants had completed their audit of AR Credits, gift certificates and rebates and had issued a demand for payment, Staples likely would not oppose an amendment.” Opp. at 9, n.4. Which is it? Staples cannot argue that, on the one hand, it will be prejudiced if it has to answer additional claims while stating, on the other hand, that it would gladly answer other claims that Staples itself admits would lead to additional “discovery and an inevitable delay of trial in this case.” Opp. at ¶ 15.

Nevertheless, Staples, citing a Delaware Superior Court case, *Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, 2010 WL 599330 (Del. Super. Ct. Feb. 19, 2010), vaguely argues that “Courts have denied proposed amendments under similar circumstances.” Opp. at ¶¶ 12-13, 15. *Sokol*, however, is plainly inapposite. There, former clients of the law firm, Dorsey & Whitney (“D&W”), sued D&W in the Delaware Court of Chancery for a declaration that legal fees billed by the firm were excessive. 2010 WL 599330, at *1. Although plaintiffs filed their complaint in the Court of Chancery, plaintiffs eventually (and curiously) suggested to the Court that it lacked subject matter jurisdiction, causing the Court to permit transfer of the case to Superior Court. *Id.* at *2. Some time after plaintiffs filed their new complaint in Superior Court, which sought the same relief as their original complaint, plaintiffs moved to amend their complaint to assert a legal malpractice claim. *Id.* In denying plaintiffs’ motion to amend, the court found that plaintiffs had, “made a strategic decision to delay seeking to amend their complaint, *most likely in an effort to*

manipulate the jurisdiction of the Court of Chancery.” Id. (emphasis added).³ Describing plaintiffs’ continual “pattern of delay,” the court noted plaintiffs had sought identical amendments to their complaint when the case was still pending in the Court of Chancery, but “opted to withdraw that motion . . . when they apparently thought it was to their benefit to do so.” *Id.* at *3. Additionally, the court noted that plaintiffs had not “explained why they did not include th[eir] [malpractice] claim when they filed their [Superior Court] complaint.” *Id.*

Here, Staples has not alleged that the State Escheator engaged in similar “deliberate delay,” nor could it. To the contrary, after the State Escheator filed his Counterclaim, the State Escheator and the State continued with their Examination of Staples, believing that Staples would provide the documents and information necessary to determine whether Staples is holding additional unclaimed GC/MC, AR Credits, and rebates. *See, e.g.,* Motion, Ex. A (proposed Supplemental Counterclaim), ¶ 40 (citing April 2009 letter from Jennifer Borden, counsel for Staples, to the State stating that, “[a]ll available documents have been, and will continue to be produced.”). But after continual delays by Staples in the interim eight-month period – including providing incomplete or inaccurate information in response to the State’s requests, and, in many instances, no information at all – the State Escheator is now forced to seek leave to file the Supplemental Counterclaim, so that that the State can finally complete its Examination of Staples.

³ Staples cites other similarly inapposite cases (Opp. at ¶15) for the proposition that courts have purportedly denied motions to supplement or amend under “similar circumstances.” *See Corp. Serv. Co. v. Pizzo*, 1995 WL 347813, at **1-2 (Del. Ch. May 18, 1995) (denying motion to amend complaint to add three additional parties where, among other things, the case was on “an expedited track-at the plaintiff’s request” and “trial is but six weeks away”); *Timblin v. Kent Gen. Hosp.*, 1995 WL 44250, at **2-4 (Del. Super. Ct. Feb. 1, 1995) (granting in part and denying in part a plaintiff’s motion to amend his complaint in five-year old case that had already been tried to verdict); *Deere & Co. v. MTD Holdings Inc.*, 2003 WL 22439778, at *6 (S.D.N.Y. Oct. 28, 2003) (denying defendants’ motion to add a counterclaim where the “Court ha[d] no jurisdictional basis upon which to hear Plaintiff’s counterclaim”).

B. THE COUNTERCLAIM AND THE PROPOSED SUPPLEMENTAL COUNTERCLAIM CONCERN THE SAME SUBJECT MATTER AS THE COUNTERCLAIM

Staples argues that Counterclaim and proposed Supplemental Counterclaim concern different subject matter because the Counterclaim seeks payment for Staples' unclaimed AP and PR, while the Supplemental Counterclaim seeks documents related to unclaimed GC/MC, AR Credits, and rebates. Opp. at ¶ 16. Incredibly, Staples goes as far as to assert that "[t]he *only factual similarity* between the proposed New Counterclaim, on the one hand, and the Complaint and existing Counterclaim, on the other hand, *is that Staples and [the State Escheator] are two of the same parties.*" Opp. at ¶ 11 (emphasis added). That is simply not the case.

Both the Counterclaim and the proposed Supplemental Counterclaim concern identical subject matter: Staples compliance with, and obligations under, the Escheat Statute. The State Escheator's original Counterclaim seeks payment by Staples of abandoned AP and PR pursuant to 12 *Del. C.* § 1156(a), while the proposed Supplemental Counterclaim seeks Staples' compliance with the State's Examination under 12 *Del. C.* § 1155, so that the State can determine whether Staples is holding additional unclaimed – and past due – GC/MC, AR Credits, and rebates belonging to third parties. The parties to the proposed Supplemental Counterclaim are the same (as Staples admits). The witnesses are the same. Indeed, the same individuals at the State, Kelmar, and Staples have participated in the Examination.

To the extent Staples argues that the Counterclaim and Supplemental Counterclaim concern different subject matter since they involve different *types* of property (Opp. at ¶¶ 11, 17), Staples has already conceded that it would not oppose the State Escheator's Motion if he were now demanding payment of – as opposed to documents concerning – unpaid GC/MC, AR Credits, and rebates. Opp. at ¶ 9, n.4.

C. STAPLES' CONDUCT REQUIRED THE STATE TO REQUEST PAYMENT OF STAPLES' ABANDONED ACCOUNTS PAYABLE AND PAYROLL PRIOR TO COMPLETING ITS EXAMINATION

Staples also argues that it would be inequitable to allow the State Escheator to supplement his Counterclaim because he and the State “made the decision to bifurcate the unclaimed property audit of Staples.” Opp. at ¶ 20. According to Staples, “Defendants could have completed the audit and dealt with all issues related to a single audit in a consolidated manner.” *Id.* Staples misses the point.

The State Escheator requested Staples pay its abandoned AP and PR liability in March 2010 because, at that time, Staples had produced records sufficient to permit the State and Kelmar to determine Staples' liability with respect to those two categories of property. By contrast, Staples had not provided – and still has not provided – records sufficient to allow the State and Kelmar to determine Staples' liability, if any, with respect to GC/MC, AR Credits, or rebates. In March 2010, however, when the State requested payment for abandoned AP and PR, it believed Staples was attempting to locate and would provide records sufficient to permit the State to complete its Examination with respect to the three other property categories. *See, e.g.*, Motion, Ex. A, ¶ 40 (citing April 2009 letter from Jennifer Borden, counsel for Staples, to the State stating that, “[a]ll available documents have been, and will continue to be produced.”). Documents, however, have not been produced, which has precluded the State from completing the Examination. Therefore, it is at best disingenuous for Staples to assert that the State “could have completed the audit and dealt with all issues related to a single audit in a consolidated manner,” when Staples has prevented the State from doing so. Staples has only itself to blame for the State Escheator's delay in determining the amount by which Staples has underreported its liability for unclaimed or abandoned GC/MC, AR Credits, and rebates. Staples' repeated refusals to produce for inspection the records that would allow the State Escheator to reach that determination are,

collectively, “transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” Ch. Ct. R. 15(d); *Agilent Technologies*, 2009 WL 119865, at *4.

D. WHETHER THE STATE ESCHEATOR’S PROPOSED COUNTERCLAIM IS A SUPPLEMENT OR AMENDMENT AND WHETHER THE NEW COUNTERCLAIM IS COMPULSORY OR PERMISSIVE IS IMMATERIAL

Whether the State Escheator’s new counterclaim is a supplement or amendment is of no moment. *See* 6A Wright, Miller & Kane, *Federal Practice & Procedure* § 1504 (3d ed.) (“Parties and courts occasionally confuse supplemental pleadings with amended pleadings and mislabeling is common. These misnomers *are not of any significance*, however, and they *do not prevent the court from considering a motion to amend or supplement under the proper portion of Rule 15.*”) (emphasis added).⁴

In any event, Staples is simply wrong when it asserts that the State Escheator should have moved to *amend* because, according to Staples, the Supplemental Counterclaim purportedly seeks records the State Escheator requested prior to filing his Counterclaim. Opp. at ¶ 4. The proposed Supplemental Counterclaim concerns records and information requests made by the State and Kelmar *after* the commencement of this litigation. *See, e.g.*, Motion, Ex. A., ¶¶ 46-48 (records relating to abandoned GC/MC provided to the State’s auditor in September 2010, and requests

⁴ In *Agilent Technologies*, 2009 WL 119865, at *5, this Court addressed the scenario where a party failed to move for leave to supplement its counterclaim, and instead attempted to *amend* its counterclaim as a matter of right. There, this Court considered the party’s supplemental claims under the appropriate rule, and ultimately granted the party leave to supplement its pleading. *Id.* (“Inadvertent inclusion of supplemental pleading in an amendment as a matter of course is not uncommon, and requires this court to consider the supplemental pleading as if it had been brought through a regular Rule 15(d) motion to supplement.”). Moreover, and as Staples itself concedes, the same liberal standard applies to both amended and supplemental pleadings. *Agilent Tech.*, 2009 WL 119865 (“As a general rule, leave to amend is freely given . . . and there is no apparent reason why the same liberality should not apply to a motion to supplement”) (internal quotations and citations omitted); Op. at 4, n.3 (citation omitted). Accordingly, it is immaterial whether the State Escheator’s new counterclaim constitutes an amendment or a supplement.

made in September 2010 and November 2010); ¶¶ 65-67 (describing conduct and events in September 2010, December 2010, and February 2011 relating to AR credits); ¶¶ 77-80 (rebates). And Staples concedes as much. Opp. at ¶ 4 (“Defendant *last month, in March 2011*, requested information for manufacturer rebates.”) (emphasis added).

Similarly immaterial is Staples’ contention that the State Escheator’s proposed Supplemental Counterclaim is permissive rather than compulsory. Opp. at ¶¶ 10-11. According to Staples, the “only factual similarity” between the Counterclaim and the proposed Supplemental Counterclaim “*is that Staples and [the State Escheator] are two of the same parties.*” *Id.* at ¶ 11. (emphasis added). Staples is wrong. As noted above, both the Counterclaim and the proposed Supplemental Counterclaim concern identical subject matter: Staples compliance with, and obligations under, the Escheat Statute, among other things. The State Escheator’s original Counterclaim seeks payment of Staples’ abandoned AP and PR pursuant to 12 *Del. C.* § 1156(a), and the proposed Supplemental Counterclaim seeks Staples’ compliance with the State’s Examination under 12 *Del. C.* § 1155. *All* existing and proposed claims concern this one examination of Staples’ records.

Admittedly, the State Escheator could have taken the route suggested by Staples and filed an entirely new complaint in the Court of Chancery. *See* Opp. at 3 n.2. (“Staples welcomes the opportunity to defend itself against [the State Escheator’s] New Counterclaim, provided Staples can do so in a separate lawsuit”). The Court could then have been burdened with designating the State Escheator’s new complaint a related action and consolidating it with this case. The State Escheator, to the obvious dismay of Staples, chose not to waste the time and resources of the Court.

In any event, regardless of whether the State Escheator’s proposed Supplemental Counterclaim is compulsory or permissive, this Court still enjoys the same “broad discretion to

allow claims to be joined in order to expedite the resolution of all of the controversies between the parties in one suit.” *See* 6A, Wright, Miller & Kane § 1403 (citations omitted). That is precisely what the State Escheator seeks here.

II. CONCLUSION

For the foregoing reasons, the State Escheator respectfully requests that this Court grant his Motion for Leave to File Supplemental Counterclaim.

Respectfully submitted,

DATED: April 26, 2011

GRANT & EISENHOFER P.A.

/s/ Michael J. Barry

Stuart M. Grant (No. 2526)

Michael J. Barry (No. 4368)

Ralph N. Sianni (No. 4151)

Ned C. Weinberger (No. 5256)

1201 N. Market Street, Ste. 2100

Wilmington, DE 19801

Tel: (302) 622-7000

Fax: (302) 622-7100

OF COUNSEL:

DELAWARE DEPARTMENT OF JUSTICE

John S. McDaniel, III (No. 2477)

Edward K. Black (No. 5302)

Carvel State Office Building, C600

820 N. French Street

Wilmington, DE 19801

Telephone: (302) 577-8842

Fax: (302) 577-8656