



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

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COUNTERCLAIM

Pursuant to Court of Chancery Rule 15(d), Defendant and Counterclaim Plaintiff Mark Udinski, in his capacity as the Director/State Escheator of the State of Delaware (the “State Escheator” or “Mr. Udinski”), by and through his undersigned counsel, hereby moves this Court for an order granting leave to file a Supplemental Verified Counterclaim, a proposed version of which is attached hereto as Exhibit A. In support of this motion, the State Escheator alleges as follows:

1. On April 30, 2010 Staples, Inc. (“Staples”) filed its Verified Complaint for Equitable, Declaratory, Injunctive and Other Relief (the “Complaint”) against 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 Revenue for the State of Delaware, the State Escheator, and the

Department of Finance, Division of Revenue for the State of Delaware (collectively, the “State”), challenging the State’s request for payment pursuant to the Delaware Escheats Law.

2. On July 14, 2010 the State answered the Complaint and the State Escheator filed a counterclaim against Staples (the “Counterclaim”) seeking the aforementioned payment.

3. On August 4, 2010, Staples filed its Answer and Affirmative Defenses to the Counterclaim.

4. The State’s examination of Staples, which is the subject of this action, consists of five categories of property – Accounts Payable, Payroll, Gift Certificates/Merchandise Credits, Accounts Receivable Credits and Rebates.

5. The State’s request for payment that precipitated this action concerns the categories Accounts Payable and Payroll. The State’s examination of the other three categories was not complete at the time Staples initiated this action, and in fact the State’s examination of these three categories remains ongoing to this day.

6. The State Escheator seeks to supplement the Counterclaim at this time to allege that, since the filing of the Counterclaim, Staples has failed to fully cooperate with the State’s investigation of the other three property categories and, accordingly, has failed to comply with the State’s examination of Staples under the Delaware Escheats Law.

7. Leave to file a supplemental pleading under Chancery Court Rule 15(d) “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 *Agilent Techs., Inc. v. Kirkland*, 2009 WL 119865 at *5 (Del. Ch. Jan. 20, 2009). “In opposing the motion to supplement, the defendant bears the burden of proving inexcusable delay and resulting prejudice.” *Id.* Rule

15(d) is therefore a “highly permissive standard.” *Agilent Technologies*, 2009 WL 119865 at *5, citing *Parnes v. Bally Entertainment Corp.*, 2000 WL 193112, at *2 (Del. Ch. Feb. 8, 2000) (“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 citations omitted).

8. Here, the State Escheator cannot reasonably be accused of inexplicable delay. If anything, Mr. Udinski and the State have been extremely patient with Staples and have given Staples every conceivable opportunity to produce documents and otherwise cooperate with the State’s examination. Moreover, Staples will suffer no prejudice from the Supplemental Counterclaim. Staples is well-aware that the State has been examining these other categories of property, and the allegations that Staples has failed to produce documents or otherwise comply with the State’s examination involve facts that are squarely within Staples’ knowledge. Staples will not be prejudiced if asked to respond to these allegations.

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CONCLUSION

9. For the foregoing reasons, the State Escheator respectfully requests that the Court grant the Motion for Leave to File Supplemental Counterclaim, and permit the filing of the attached proposed Verified Supplemental Counterclaim.

Respectfully submitted,

DATED: April 6, 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