

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUNOCO, INC.	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
PRAXAIR, INC.	:	
Defendant.	:	NO. 01-1475

M E M O R A N D U M

Newcomer, S.J.

April , 2001

Presently before the Court is plaintiff's Motion for Leave to Amend its Complaint, and defendant's response thereto.

**I. BACKGROUND**

On March 1, 2001, plaintiff filed a Complaint for Declaratory Judgment in the Court of Common Pleas, Philadelphia County, seeking the Court to declare that the parties' Product Supply Agreement #S-70004 (the "Agreement") was terminated as of February 28, 2001. The Agreement required plaintiff to purchase certain industrial gases, including liquid nitrogen, and related services for several of plaintiff's facilities from defendant.<sup>1</sup> On or about March 28, 2001, defendant removed the case to this Court, and subsequently filed an Answer denying that the parties' Agreement terminated on February 28, 2001.

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<sup>1</sup>Although the Agreement does not expressly require plaintiff to purchase liquid nitrogen from defendant, the parties agree that the primary industrial gas which defendant was to supply plaintiff was liquid nitrogen pursuant to the Agreement and six Riders (numbered 1-6) the parties subsequently entered into.

Plaintiff, Sunoco, Inc., is a Pennsylvania corporation with its principal place of business located at 1801 Market Street, Philadelphia, Pennsylvania 19103. Defendant, Praxair, Inc. is a Connecticut corporation authorized to conduct business in the Commonwealth of Pennsylvania, and at all relevant times conducted business in Pennsylvania.

Plaintiff alleges that because it anticipated the parties' Agreement to terminate on February 28, 2001, plaintiff entered into negotiations with other nitrogen suppliers to obtain its nitrogen requirements. Plaintiff further alleges that it was able to reach a proposed agreement with BOC gases ("BOC"), a Delaware Corporation, in which plaintiff would purchase its requirements of liquid nitrogen from BOC. The proposed agreement between plaintiff and BOC would save plaintiff \$1,666,165.00 over five years.

However, plaintiff claims that BOC will not execute the proposed agreement with plaintiff because defendant has not acknowledged that the Agreement between plaintiff and defendant terminated on February 28, 2001. Accordingly, plaintiff now seeks leave to amend its Complaint to add a second Count against defendant for the \$1,666,165.00 plaintiff would save if it could enter into the proposed agreement with BOC.

## **II. DISCUSSION**

The parties agree that Federal Rule of Civil Procedure

15(a) governs plaintiff's Motion. Accordingly, that rule states in relevant part that "a party may amend the party's pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires." FED. R. CIV. P. 15(a).

The Third Circuit has explained that leave should ordinarily be granted, but that "prejudice to the non-moving party is the touchstone for the denial of an amendment." See Lorenz v. CSX Co., 1 F.3d 1406, 1414 (3rd Cir. 1993) (quoting Cornell & Co. v. Occupational Safety & Health Review Comm'n, 573 F.2d 820, 823 (3rd Cir. 1978). "In the absence of substantial or undue prejudice, denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment." Id. (citing Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc., 663 F.2d 419, 425 (3rd Cir. 1981), cert. denied, 455 U.S. 1018, 102 (1982).

In its response, defendant argues that plaintiff's Motion to Amend should be denied on the grounds that the proposed amendment would be futile.<sup>2</sup> An amendment is considered futile

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<sup>2</sup>In its memorandum in support of its Motion to Amend, plaintiff argues that defendant would not be prejudiced if the Court were to permit plaintiff to file an Amended Complaint, and claims that it does not seek to file an Amended Complaint based upon bad faith or dilatory motives. In its response, defendant

"if the amended complaint cannot withstand a motion to dismiss." Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 292 (3rd Cir. 1988). Thus, if a motion for leave to amend is opposed on the grounds that the proposed amended complaint would be futile, the court in ruling on the motion should use the same legal standard it employs when deciding a motion for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). See In re Burlington Coat Factory Sec. Litig., 1410, 1435 (3rd Cir. 1997).

When evaluating a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept each allegation in a well pleaded complaint as true. See Albright v. Oliver, 510 U.S. 266, 268 (1994). Additionally, a Motion to Dismiss should only be granted if the Court finds that no proven set of facts would entitle the Plaintiff to recovery under the filed pleadings. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Contending that plaintiff's proposed amendment fails to state a claim, defendant assumes plaintiff's new claim sounds in negligence. Defendant argues that plaintiff has failed to allege that defendant had a duty to agree to plaintiff's interpretation of the termination date of the Agreement. However, this argument

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does not contest these points, but instead only argues that plaintiff's proposed amendment would be futile. Accordingly, the Court finds that plaintiff's proposed amendment is otherwise appropriate, and the Court's opinion today only focuses upon the futility of plaintiff's proposed amendment.

makes little sense as plaintiff's claim is for declaratory judgment requiring the interpretation of the parties' Agreement. According to plaintiff, the parties agreed that they would terminate the Agreement on February 28, 2001, and when defendant failed to terminate the Agreement, plaintiff lost out on \$1,666,165.00 in savings. To the extent defendant disagrees over plaintiff's interpretation of the parties' Agreement, that issue is more appropriately raised at a later time. Now, the Court does not find that plaintiff's proposed amendment is futile, and will grant plaintiff leave to file an Amended Complaint.

An appropriate Order will follow.

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Clarence C. Newcomer, S.J.