

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

STEPHEN P. LAMB
VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: April 23, 2008
Decided: May 7, 2008

Michael D. Goldman, Esquire
Potter Anderson & Corroon LLP
1313 N. Market Street
Wilmington, DE 19899

David McBride, Esquire
Young Conaway Stargatt & Taylor
1000 West Street
Wilmington, DE 19801

Kelly A. Terribile, Esquire
Greenberg Traurig LLP
1007 N. Orange Street
Wilmington, DE 19801

***RE: NACCO Industries, Inc. and HB-PS Holding Co., Inc. v.
Applica Inc., et al., C.A. No. 2541-VCL***

Dear Counsel:

This letter opinion addresses the plaintiffs' motion for leave to amend their verified amended complaint. For the reasons stated below, the motion will be granted.

I.

Plaintiffs NACCO Industries, Inc. and HB-PS Holding Company, Inc., now known as Hamilton Beach, Inc., moves pursuant to Court of Chancery Rule 15 for leave to file a second amended complaint (the "Proposed Complaint"). The

plaintiffs filed their first complaint on November 13, 2006, which sought to enjoin the proposed acquisition of the defendant Applica by the Harbinger defendants. The plaintiffs obtained expedited discovery, but ultimately withdrew their application for a preliminary injunction on December 1, 2006. The defendants filed motions to dismiss and for summary judgment on December 1, 2006 and December 4, 2006, but never filed briefs in support of those motions.

On December 18, 2006, the plaintiffs filed a related action premised on federal securities laws in the United States District Court for the Northern District of Ohio. The federal court denied the plaintiffs' request for a temporary restraining order, preliminary injunction, and expedited discovery on December 20, 2006.¹ The parties then returned to this court, where the plaintiffs informed the defendants that they wished to amend their complaint in light of the discovery they received during the injunction proceeding. The parties agreed to defer briefing the defendants' pending motions, and to instead allow the plaintiffs to file an amended complaint and then proceed with motions to dismiss directed at the amended complaint.

Approximately ten months later, on October 29, 2007, the plaintiffs filed their verified amended complaint. The defendants filed their motions to dismiss

¹ The plaintiffs voluntarily withdrew the federal complaint on January 10, 2007.

the verified amended complaint and briefs in support on December 21, 2007.

Instead of filing a responsive brief, on February 28, 2007, the plaintiffs moved for leave to amend the verified amended complaint. The defendants opposed the motion, and the parties agreed that the motion should be resolved based on the briefs filed.

II.

Rule 15(aaa) contemplates amendments or motions for leave to amend after a dismissal motion is filed in only two situations: “(i) before the due date of a brief responding to the motion to dismiss, and (ii) after the court decides that dismissal is warranted.”² “In the first case, the motion is governed by the liberal standards of Rule 15(a). In the second, the more stringent standard of Rule 15(aaa) applies”³ In this case, the plaintiffs have filed their motion for leave to amend instead of filing a responsive brief, thereby bringing this case under Rule 15(a)’s liberal standards.

Rule 15(a) provides that motions for leave to amend “shall be freely given when justice so requires.”⁴ This determination is a matter of the court’s

² *Stern v. LF Capital Partners, LLC*, 820 A.2d 1143, 1144 (Del. Ch. 2003).

³ *Id.* at 1144.

⁴ *In the Matter of Transamerica, Inc.*, No. 1039, 2006 WL 587846, at *2 (Del. Ch. Feb. 28, 2006).

discretion.⁵ Rule 15(a) reflects the modern philosophy that cases “are to be tried on their merits, not on the pleadings.”⁶ Therefore, courts generally will not test the sufficiency of the pleadings in ruling on a motion to amend.⁷ A motion to amend may be denied, however, if the amendment would be futile, in the sense that the legal insufficiency of the amendment is obvious on its face.⁸ In exercising its discretion, the court also considers factors such as bad faith, undue delay, dilatory motive, repeated failures to cure by prior amendment, undue prejudice, and futility of amendment.⁹

III.

In this case, the defendants point to several reasons the court should deny the motion to amend. First, they contend the plaintiffs have repeatedly failed to file a complaint capable of withstanding a motion to dismiss. Specifically, the defendants note that this is the plaintiffs’ second amended complaint, and that it was filed after the plaintiffs obtained extensive discovery in their failed

⁵ *Fields v. Kent County*, No. 1096, 2006 WL 345014, at *4 (Del. Ch. Feb. 2, 2006); *Lillis v. AT&T Corp.*, 896 A.2d 871, 877 (Del. Ch. 2005).

⁶ Ct. Ch. R. 15(a); *Transamerica*, 2006 WL 587846, at *2.

⁷ *Transamerica*, 2006 WL 587846, at *2.

⁸ *Id.* at *2; *Zimmerman v. Braddock*, 2005 WL 2266566, at *6 (Del. Ch. Sept. 8, 2005); *Rodriguez v. Palmer*, No. 00A-03-002, 2001 WL 1628317, at *3 (Del. Super. Sept. 26, 2001).

⁹ *See, e.g., Fields*, 2006 WL 345014, at *4; *Lillis*, 896 A.2d at 878 n.18; *Zimmerman*, 2005 WL 2266566, at *6; *N.S.N. Int’l Indus. v. E.I. DuPont de Nemours & Co.*, No. 12902, 1994 WL 148271, at *8 (Del. Ch. Mar. 31, 1994) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

preliminary injunction proceeding in this court, conducted a failed proceeding in Ohio federal court, and took ten months to draft their first amended complaint.

The defendants also maintain that the facts added to the Proposed Complaint were within the knowledge of the plaintiffs and should have been included in the first amended complaint. According to the defendants, the plaintiffs have offered no explanation for this purportedly undue delay. The defendants further argue that the plaintiffs have engaged in strategic posturing because the Proposed Complaint omits facts contained in the first amended complaint that contradict their claims. The defendants also contend that the plaintiffs' amendments are conclusory, do nothing to further their fraud claims, and are therefore futile. In addition, the defendants argue that the cost of having to draft a second brief in support of their motion to dismiss constitutes undue prejudice—especially considering that the defendants have already incurred the costs of expedited discovery in the preliminary injunction proceeding in this court, as well as the costs of the federal case in Ohio. Alternatively, the defendants ask the court to condition approval of the plaintiffs' motion on the plaintiffs' payment of the defendants' costs and legal fees incurred in drafting of the defendants' prior motion to dismiss. In support, the

defendants cite to *Franklin Balance Sheet Investment Fund v. Crowley*¹⁰ and *Lillis v. AT&T Corp.*¹¹

The court has considered the defendants' objections and, in its discretion, finds that the interests of justice would best be served by allowing the plaintiffs to amend their complaint. Nothing suggests the plaintiffs wrongfully omitted facts from their first amended complaint that were obviously important to their claims, or attempted to either delay the litigation or force the defendants to incur additional costs. Rather, the plaintiffs' amendments represent good faith attempts to cure alleged pleading defects the defendants identified. This is precisely the circumstance for which Rule 15 was intended.

Additionally, the defendants have identified no prejudice aside from the additional costs associated with drafting another motion to dismiss that they might suffer. The court is cognizant of the significant costs briefing such motions can incur. Even considering the expenses the defendants have already incurred, however, such costs do not rise to the level of "undue prejudice." Given the court's preference for resolving matters on the merits and the absence of material prejudice to the defendants, as well as the fact that leave to amend is freely given, the motion for leave to amend will be granted.

¹⁰ No. 888, 2006 WL 3095952 (Del. Ch. Oct. 19, 1992).

¹¹ 896 A.2d 871.

Further, the defendants' request that the plaintiffs' pay the defendants' costs and legal fees incurred in the drafting the defendants' prior motion to dismiss will be denied. This is not a case, such as *Franklin Balance* or *Lillis*, in which the plaintiffs sought leave to amend only after defending their pleading with full briefing and oral argument.¹²

IV.

For the reasons stated herein, the plaintiffs' motion for leave to amend is GRANTED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor

¹² 2006 WL 3095952, at *6; 896 A.2d at 879.