SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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March 14, 2012

TO: All Counsel of Record

RE: ***Pella Corporation, et al. v. American Casualty Company of Reading, P.A., et al.***
C.A. No. N11C-10-223 JRS CCLD
Upon Consideration of Defendants' Motion to Strike the First Amended Complaint. **GRANTED in Part and DENIED in Part.**

Dear Counsel:

The Court has considered whether plaintiffs' pleading, styled as a First Amended Complaint, and filed without leave of court, should be deemed an "amended complaint" under Delaware Superior Court Civil Rule 15(a) or a "supplemental complaint" under Rule 15(d). Defendants have argued that the pleading is a supplemental complaint and that it should be stricken because plaintiffs did not seek leave of court before filing it, as required by Rule 15(d). In response, plaintiffs argue that the pleading is an amended pleading which they were entitled to

file as of right because defendants had not yet filed a responsive pleading.[1] For the reasons that follow, Defendants' Motion to Strike Plaintiffs' First Amended Complaint is **GRANTED in part** and **DENIED in part**.

The distinction between an amended and supplemental complaint is drawn within Rules 15(a) and 15(d) and relates to the time frame in which the matters to be added to the complaint occurred. For its part, Rule 15(a) does not expressly define the term "amended complaint" (or "amended pleading")" nor does it offer any basis to distinguish between an "amended complaint" and a "supplemental complaint."[2] Rule 15(d), in contrast, specifies that a "supplemental" complaint refers to a complaint in which the plaintiff adds to the original complaint by "set[ting] forth transactions or occurrences or events which have happened *since* the date of the pleading sought to be supplemented."[3] When interpreting these two rules together,

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[1]Del. Super. Ct. Civ. R. 15(a). Defendants moved to dismiss or stay plaintiffs' initial complaint, *inter alia*, on the ground of *forum non conveniens*. The Court already has determined that these motions were not "responsive pleadings" as contemplated by Rule 15(a). *See Stoppel v. Henry*, 2011 WL 55911, at *9 (Del. Super. Jan. 4, 2011) (holding that a motion to dismiss is not a "responsive pleading" under Rule 15(a)). Accordingly, the Court has held that if the plaintiffs' "First Amended Complaint" is, in fact, an amended complaint, then plaintiffs need not have sought leave of court under Rule 15(a) before filing it. *Id.*

[2] Del. Super. Ct. Civ. R. 15(a) states: "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . ."

[3] Del. Super. Ct. Civ. R. 15(d) (emphasis supplied) ("Upon motion of a party the Court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of (continued...)

courts have implied that an amendment to a pleading, whether filed with or without leave of court, should only relate to matters that have taken place prior to the date of the pleading to be amended.[4]

Rule 15 draws the distinction between amended and supplemental pleadings in order to give direction to the pleading party with respect to the circumstances under which the pleadings may be filed. According to Rule 15(a), amended pleadings may, under designated circumstances, be filed "as a matter of course" (without leave of court), whereas, according to Rule 15(d), all supplemental pleadings may be filed only with leave of court.[5] Often the distinction is inconsequential if not completely ignored.[6] In this case, however, the defendants have argued that the distinction is

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[3](...continued)
the pleading sought to be supplemented.").

[4] *See* 6 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE ("WRIGHT & MILLER") § 1473 at 601 (2010) (citing cases); *Agilent Technologies, Inc. v. Kirkland*, 2009 WL 119865, at *4 (Del. Ch. Jan. 20, 2009) ("The defining difference between the two [amended and supplemental pleadings] is that supplemental pleadings deal with events that occurred after the pleading to be revised was filed, whereas amendments deal with matters that arose before the filing."); *ConnectULLC v. Zuckerberg*, 522 F.3d 82, 90 (1st Cir. 2008) ("An amended complaint filed pursuant to Federal Rule of Civil Procedure 15(a) typically relates to matters that have taken place prior to the date of the pleading that is being amended.").

[5] *Compare* Del. Super. Ct. Civ. R. 15(a) (allowing one pleading amendment as a matter of course without leave of court before a responsive pleading is served) *with* Del. Super. Ct. Civ. R. 15(d) (permitting a supplemental pleading upon motion and decision of the court).

[6] *See* 6A WRIGHT & MILLER § 1504 at 255-56 (2008) (interpreting Fed. R. Civ. P. 15(d) on which Del. Super. Ct. Civ. R. 15(d) is based).

important because plaintiffs' improper characterization of their new complaint as an amended complaint has deprived defendants of the opportunity to argue why the Court should decline leave to supplement the complaint with an entirely new claim that has arisen since the filing of the original complaint. For the reasons that follow, the Court agrees.[7]

The Glube Lawsuit

In plaintiffs' original complaint, they sought a declaration of insurance coverage for claims brought against them in the so-called *"Saltzman"* lawsuit. In their "amended" complaint, plaintiffs add an entirely new claim for coverage based on the so-called "*Glube"* lawsuit, filed against plaintiffs on February 1, 2012. Plaintiffs' original complaint was filed on October 26, 2011.

The Court of Chancery faced a similar situation in *Agilent Technologies, Inc.*

[7] Wright & Miller explains that where a supplemental pleading has been "interposed" by a party without leave of court in the mistaken belief it is a Rule 15(a) amendment filed as a matter of course, prejudice typically will not be found because the time for filing an amendment as a matter of course is short. *Id.* at 257. Wright & Miller contemplates, however, that "[a]n opposing party who does feel aggrieved [by the filing of a supplemental pleading as a matter of course] may move to strike the mislabeled pleading, which would have the practical effect of bringing the question of its propriety before the court as if it had been raised on a motion under Rule 15(d)." *Id.* at 257. Fed. R. Civ. P. 15(a) was amended in 2009 to restrict any amendments as "a matter of course" to 21 days after serving the complaint, or 21 days after the filing of a responsive brief or motion under Rule 12(b), (e), or (f) - - making the predicament *sub judice* rare in the federal courts. Superior Court Civil Rule 15(a) has not been so amended.

v. Kirkland,[8] in which an amended counterclaim had been filed with the mistaken belief that it was an amendment permitted to be filed as a matter of course under Rule 15(a). The opposing party argued, and the Court agreed, that the amended counterclaim was improperly filed without leave of court because it contained supplemental allegations relating to events that occurred after the original counterclaim was filed.[9] In the end, the Court viewed the supplemental pleading as if it had been filed via a Rule 15(d) motion to supplement and found that the opposing party had not presented a compelling reason why leave to supplement should not be granted.[10]

According to Rules 15(a) and 15(d), and the interpretation in *Agilent*, the Court is satisfied that the additional allegations with regards to the *Glube* lawsuit set forth in the First Amended Complaint constitute "transactions or occurrences or events which have happened since the date" of the original complaint. Accordingly, the First Amended Complaint is actually a supplemental complaint, at least with respect

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[8] 2009 WL 119865, at *5 (Del. Ch. Jan. 20, 2009). Court of Chancery Rules 15(a) and 15(d) are identical to Superior Court Civil Rules 15(a) and 15(d).

[9] *Id.* at *4.

[10] *Id.* The opposing party argued only that the counterclaim as amended was futile and the Court disagreed. The opposing party did not argue inexcusable delay or prejudice. *Id.* As a result, the Court found "where there merely has been a technical mistake in an otherwise permissible amendment, I see no reason to exclude allegations that are pertinent to matters already before the court." *Id.*

to the allegations and claims relating to the *Glube* lawsuit, and plaintiffs should have sought leave of court before filing it.[11]

In accordance with Rule 1,[12] the Court's first inclination is to construe plaintiffs' filing of the amended complaint, and the parties' submissions on the defendants' motion to strike, as a motion to supplement the original complaint (with response) that would allow the Court *sua sponte* to engage in a Rule 15 analysis of whether plaintiffs should be granted leave to supplement their complaint.[13] Unfortunately, the Court cannot take that shortcut in this instance. In contrast to *Agilent*, this Court is not addressing the issue of supplementation along with a motion to dismiss where the *bona fides* of the proposed supplements were fully explored.[14] Thus far the parties' submissions have focused only on whether the First Amended Complaint is, in fact, an amendment that can be filed as a matter of course, or a

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[11] *See* Super. Ct. Civ. R. 15(d) (requiring that a supplemental pleading be filed by motion); *Agilent*, 2009 WL 119865, at *4 (defining a pleading that set forth allegations of events that occurred after the filing of the original counterclaim as a supplemental pleading under Ct. Ch. R. 15(d)).

[12] *See* Del. Super. Ct. Civ. R. 1 ("[These rules] shall be construed and administered to secure the just, speedy and inexpensive determination of every proceeding.").

[13] *See Agilent*, 2009 WL 119865, at *5 ("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.") (citing 6A WRIGHT & MILLER § 1504).

[14] *Id.* at *5 (analyzing the merits of the amended counterclaim in the context of a 12(b)(6) motion).

supplement that can filed only upon leave of court. Defendants have strongly suggested, however, that inclusion of the *Glube* lawsuit in this coverage litigation would be prejudicial to them to an extent that would justify the denial of leave to supplement. But neither party has fully addressed this issue within procedural framework contemplated by Rule 15.[15] The Court is satisfied that both parties should be given an opportunity to offer this guidance to the Court.

Based on the foregoing, defendants' motion to strike the First Amended Complaint is **GRANTED** with regard to the allegations and claims relating to the *Glube* lawsuit, subject to plaintiffs' right to file a motion for leave to supplement their original complaint under Rule 15(d). The parties shall meet and confer and then submit to the Court a proposed expedited briefing schedule that will allow the Court

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[15] Specifically, defendants' have alluded to undue delay, disruption of the presentation of their motions to dismiss or stay that were scheduled for a hearing and the inclusion of defendants not a party to the *Glube* lawsuit. *Compare with ConnectU LLC v. Zuckerberg*, 522 F.3d at 90 ("The defendants did not move to strike it, nor have they presented any developed argumentation either below or on appeal to the effect that the pleading should be regarded as a supplemental complaint. Thus, any issue regarding the possible status of the pleading as a supplemental complaint is waived.") (citation omitted); *Harris v. Rios*, 2011 WL 201483, at *2 (E.D. Cal. Jan. 20, 2011) (denying plaintiff's motion to supplement pleadings and granting plaintiff leave to file an amended complaint as a matter of course with allegations that had occurred since the first amended complaint since no responsive pleading had been filed and no defendant had entered an appearance or been served); *Center for Biological Diversity v. Kempthorne*, 2008 WL 2468454, at *2 (N.D. Cal. June 17, 2008) ("It is not clear that Rule 15(d), rather than 15(a)(1), should apply to Plaintiffs' amendment. In any event, the Court would grant Plaintiffs leave to file a supplemental complaint if such leave were required under the present circumstances. Requiring Plaintiffs to re-file the amended complaint-which Defendants have already answered-as a supplemental complaint would be pointless.").

to consider the motion for leave to supplement in connection with the motions to dismiss or stay to be presented on April 23, 2012. Supplemental briefing on this motion shall be limited to ten (10) pages per side.

The Saltzman Lawsuit

Plaintiffs also amended the original complaint by revising certain sections of the complaint relating to the *Saltzman* lawsuit.[16] These changes refer, for the most part, to actions taken by the parties in settlement and mediation discussions beginning in February 2011, before the original complaint was filed in October 2011.[17] These changes, therefore, constitute amendments to the complaint under Rule 15(a). Defendants' Motion to Strike the Amended Complaint with regard to the additional allegations relating to the *Saltzman* lawsuit is **DENIED**.

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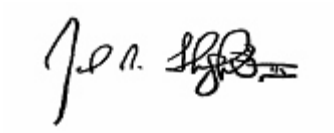
[16] *See* Plaintiff's Brief in Opposition to Defendants' Motions to Strike the First Amended Complaint at p. 4 (listing additions: "(iv) a more detailed section on the *Saltzman* Lawsuit settlement negotiations process, which began in February 2011, and agreements-in-principle that occurred prior to or arose directly out of transactions or occurrences or events that occurred prior to the filing of the original Complaint but that could not be disclosed at the time the Complaint was filed; (v) certain clarifications to Pella Corp. and PWD's claims in relation to the *Saltzman* Lawsuit; and (vi) certain corrections of typographical errors that existed in the original Complaint.").

[17] Plaintiffs do allege that the settlement agreement, negotiation of which began in February 2011, was finalized as to plaintiffs' attorneys' fees on December 19, 2011 (after the filing of the complaint), and that the parties to the *Saltzman* lawsuit continue to work to finalize the agreement. To the extent these allegations include "transactions or occurrences or events" that have happened since the filing of the complaint, defendants have not suggested any compelling reason why leave to include these allegations should not be freely granted by the Court. Accordingly, the Court need not determine under which Rule those allegations fall. *See Agilent*, 2009 WL 119865, at *5 (granting leave to supplement without the need to file a formal motion when it was clearly evident that the relief was justified).

IT IS SO ORDERED.

Very truly yours,



Joseph R. Slights, III

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