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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

**ANDREW E. ZALKOW; and ZALKOW)
DISCOUNT SOURCING, an Arizona)
limited liability company,)
)
Plaintiffs,)
)
vs.)
)
TAYMOR INDUSTRIES U.S.A., INC., a)
California corporation; TAYMOR)
INDUSTRIES LTD., a Canadian)
corporation,)
)
Defendants.)
_____)**

2:14-cv-00243 JWS

**PRELIMINARY
ORDER AND OPINION**

[Re: Motion at Docket 36]

I. PRELIMINARY NATURE OF THIS ORDER

This order does NOT decide the motion at docket 36. Rather, this order is intended to assist counsel in preparing for oral argument. It sets forth the court’s preliminary views. It does not authorize the filing of any additional motion papers.

1 Following oral argument, the court may adopt the order in whole or in part in its
2 disposition of the motion.

3 II. MOTION PRESENTED

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5 At docket 36, pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant
6 Taymor Industries Ltd. (“Taymor Canada”) moves for dismissal of Counts One and
7 Three of the First Amended Complaint and for dismissal of the request for injunctive
8 and declaratory relief in Count Two of the First Amended Complaint. Defendant
9 Taymor Industries U.S.A., Inc. (“Taymor USA”) moves for dismissal of Count Three of
10 the First Amended Complaint. Plaintiffs Andrew E. Zalkow (“Zalkow”) and Zalkow
11 Discount Sourcing (“ZDS”) respond at docket 46. Defendants reply at docket 49. Oral
12 argument is scheduled for May 22, 2015.
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15 III. BACKGROUND

16 Taymor USA is a California corporation that imports and sells hardware items,
17 including towel racks, toilet paper holders, faucets, and lock sets. It is wholly owned by
18 Taymor Canada. Zalkow was formerly employed as the president of Taymor USA,
19 where his compensation included an annual bonus that was based on a percentage of
20 the profits of both Taymor Canada and Taymor USA. In 2013 Taymor USA tendered
21 Zalkow an annual bonus of \$489,608. Zalkow rejected the bonus as insufficient “due to
22 a variety of factors, including but not limited to, decisions made by Taymor Canada
23 related to the operations of Taymor [USA] that substantially reduced its 2012–2013
24 profits.”¹
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28 ¹Doc. 34 at p. 3.

1 After Zalkow resigned from Taymor USA, he established ZDS, a company that
2 sells products that do not compete with Taymor USA, including tile, manufactured
3 stone, doors, and patio furniture. Zalkow tried to recruit three independent marketing
4 representatives who have business relationships with Taymor USA. All three were
5 initially interested in working with Zalkow, but were dissuaded from doing so when
6 Taymor Canada told them it would be a conflict of interest. Taymor Canada also is
7 alleged to have misrepresented the scope of the Zalkow's non-compete and non-
8 solicitation provisions to at least one of the representatives.
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11 Plaintiffs brought the present action against defendants, originally alleging a
12 claim for breach of contract and a claim for intentional interference with prospective
13 contractual relations. Pursuant to defendants' first motion to dismiss at docket 6, the
14 court dismissed the breach-of-contract claim as to Taymor Canada and the contract
15 interference claim as to Taymor USA. Plaintiffs then amended their complaint.² Count
16 One of the First Amended Complaint alleges a breach of contract by both Taymor USA
17 and Taymor Canada. Count Two alleges that Taymor Canada intentionally interfered
18 with plaintiffs' prospective contractual relations. Count Three alleges a breach of the
19 covenant of good faith and fair dealing by both defendant companies. Defendants
20 subsequently filed the motion to dismiss at issue, requesting that Count One be
21 dismissed as to Taymor Canada, that Count Two be dismissed to the extent it requests
22 injunctive and declaratory relief, and that Count Three be dismissed in its entirety.
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28 ²Doc. 34.

1 **IV. STANDARD OF REVIEW**

2 Rule 12(b)(6) tests the legal sufficiency of a plaintiff's claims. In reviewing such
3 a motion, "[a]ll allegations of material fact in the complaint are taken as true and
4 construed in the light most favorable to the nonmoving party."³ To be assumed true,
5 the allegations "may not simply recite the elements of a cause of action, but must
6 contain sufficient allegations of underlying facts to give fair notice and to enable the
7 opposing party to defend itself effectively."⁴ Dismissal for failure to state a claim can be
8 based on either "the lack of a cognizable legal theory or the absence of sufficient facts
9 alleged under a cognizable legal theory."⁵ "Conclusory allegations of law . . . are
10 insufficient to defeat a motion to dismiss."⁶

11 To avoid dismissal, a plaintiff must plead facts sufficient to "state a claim to relief
12 that is plausible on its face."⁷ "A claim has facial plausibility when the plaintiff pleads
13 factual content that allows the court to draw the reasonable inference that the
14 defendant is liable for the misconduct alleged."⁸ "The plausibility standard is not akin to
15 a 'probability requirement,' but it asks for more than a sheer possibility that a defendant
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22 ³*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

23 ⁴*Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

24 ⁵*Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

25 ⁶*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

26 ⁷*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550
27 U.S. 544, 570 (2007)).

28 ⁸*Id.*

1 has acted unlawfully.”⁹ “Where a complaint pleads facts that are ‘merely consistent
2 with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility
3 of entitlement to relief.’”¹⁰ “In sum, for a complaint to survive a motion to dismiss, the
4 non-conclusory ‘factual content,’ and reasonable inferences from that content, must be
5 plausibly suggestive of a claim entitling the plaintiff to relief.”¹¹
6

7 V. DISCUSSION

8 **A. Applicable Law**

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10 The parties agree that Canadian law should govern the court’s analysis of Count
11 One and Count Three given plaintiffs’ amended complaint, which makes clear that the
12 breach-of-contract claim against Taymor Canada is based on an alleged breach of a
13 December 2012 settlement/purchase and sale agreement between plaintiffs and
14 Taymor Canada, referred to by the parties as the “Mason Agreement.”¹² The Mason
15 Agreement requires application of the law of British Columbia and the law of Canada as
16 to any dispute concerning the Mason Agreement or its construction.¹³ However, the
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20 ⁹*Id.* (citing *Twombly*, 550 U.S. at 556).

21 ¹⁰*Id.* (quoting *Twombly*, 550 U.S. at 557).

22 ¹¹*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); see also *Starr*, 652 F.3d
23 at 1216.

24 ¹²Doc. 36-1.

25 ¹³It remains unclear in the complaint whether the breach-of-contract claim against
26 Taymor USA is premised on an employment contract or on the Mason Agreement. Plaintiffs
27 concede, however, that Taymor USA is not a party to the Mason Agreement so presumably any
28 breach-of-contract allegation on the part of Taymor USA is based on a separate agreement not
explicitly mentioned in the complaint. It is not clear what law would need to be applied to that
unspecified agreement; regardless, the motion to dismiss does not challenge Count One as to
Taymor USA.

1 parties agree that Arizona law, not Canadian law, should govern plaintiffs' interference-
2 of-contract claim.

3 **B. Breach of Contract Against Taymor Canada**
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5 Plaintiffs acknowledge that “breach of contract claims are pled similarly in both
6 Canada and Arizona.”¹⁴ In order to state a claim in contract, a plaintiff must establish
7 that there was an agreement and a breach by the defendant.¹⁵ At docket 15, the court
8 dismissed plaintiffs' breach-of-contract claim as to Taymor Canada. The breach-of-
9 contract claim is based on a dispute about Zalkow's annual bonus, and the court
10 concluded that the complaint did not allege that Taymor Canada had failed to perform a
11 contractual duty related to the bonus, even assuming that Taymor Canada was a party
12 to Zalkow's employment agreement.¹⁶ The amended complaint has not fixed this
13 deficiency.
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16 As with the original complaint, the amended complaint makes clear that Taymor
17 USA was Zalkow's employer. It asserts that Zalkow worked for Taymor USA, that
18 Taymor USA paid Zalkow annual bonuses, and that Taymor USA failed to pay him “his
19 fully earned bonus.”¹⁷ Plaintiffs' new allegations linking Taymor Canada to the bonus—
20 that Taymor USA acted “pursuant to the direction of Taymor Canada” and that
21 “decisions made by Taymor Canada” caused the bonus to be lower than
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24 ¹⁴Doc. 46 at p. 5.

25 ¹⁵*Coast Dryland Services Ltd. v. Canada (Ministry of Fisheries & Oceans)*, 2007 FC 16
26 (Can. (“In terms of breach of contract, the essential elements of the cause of action are the
existence of a contract and its wrongful breach.”)).

27 ¹⁶Doc. 15 at p. 4.

28 ¹⁷Doc. 34 at p. 3.

1 expected¹⁸—do not change the fact that the complaint fails to allege that Taymor
2 Canada had any contractual obligation to pay Zalkow’s bonus.

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4 Plaintiffs argue that while Taymor Canada is not a party to any employment
5 agreement with Zalkow, Taymor Canada can still be liable for a breach of contract in
6 relation to the bonus under the Mason Agreement. The language in the Mason
7 Agreement that Zalkow relies upon states as follows:

8 [Zalkow] agrees to resign as an officer and employee of Taymor [USA]
9 effective March 31, 2013 and until that date he will continue working full time
10 for Taymor [USA] in his present position at his present compensation and
11 benefit arrangements (including bonus) and will assist Taymor USA in any
12 transition matters that are required to be dealt with as a result of his
13 resignation.¹⁹

14 Such language does not impose a direct contractual obligation on Taymor Canada to
15 pay Zalkow. The complaint does not otherwise allege that Taymor Canada expressly
16 assumed any duty to do so as part of the Mason Agreement. Plaintiffs’ new allegations
17 that Taymor Canada directed and otherwise caused Taymor USA to underpay Zalkow
18 does not fix the deficiency.

19 **C. Intentional Interference with Prospective Contractual Relations**

20 Plaintiffs’ second cause of action alleges that Taymor Canada intentionally
21 interfered with their prospective contractual relations based on Taymor Canada’s
22 statements to three independent representatives that Zalkow was trying to recruit.²⁰ In
23 addition to seeking damages for Taymor Canada’s conduct, plaintiffs are also seeking
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26 ¹⁸Doc. 34 at p. 3.

27 ¹⁹Doc. 36-1 at p. 7.

28 ²⁰Doc. 34 at pp. 5-6.

1 injunctive and declaratory relief. Taymor Canada moves to have the second cause of
2 action dismissed to the extent that it seeks such relief, arguing that injunctive and
3 declaratory relief is now moot given that the non-solicitation agreement expired as of
4 December 31, 2014. “[T]o the extent that Taymor Canada is alleged to have
5 misrepresented the scope of this agreement in the past, it is a type of tortious
6 interference that is not susceptible to being repeated in the future.”²¹ Plaintiffs concede
7 that the court should dismiss the claims for injunctive and declaratory relief given the
8 expiration of the non-solicitation agreement.²²

11 **D. Good Faith and Fair Dealing**

12 The basis for plaintiffs’ bad faith claim is the Mason Agreement.²³ However,
13 Taymor USA is not a party to the Mason Agreement. Indeed, plaintiffs acknowledge in
14 their response brief that the Mason Agreement was between plaintiffs and Taymor
15 Canada.²⁴ Taymor USA cannot be held liable for bad faith performance of a contract to
16 which it was not a party, and there is no allegation that plaintiffs’ bad faith claim stems
17 from the employment agreement between Zalkow and Taymor USA.

18 Moreover, plaintiffs have not sufficiently pled a good faith claim under Canadian
19 law. The Supreme Court of Canada recently discussed whether Canadian common law
20 imposes a general duty of good faith on contracting parties in all contracts. It noted that
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23 ²¹Doc. 36 at p. 6.

24 ²²Doc. 46 at p. 12.

25 ²³Doc. 34 at p.39 (“In breach of the implied covenant of good faith and fair dealing,
26 Taymor Canada and Taymor [USA], at the direction of Taymor Canada, have taken actions to
27 deprive Zalkow of the benefits of the [Mason Agreement] . . .”).

28 ²⁴Doc. 46 p. 5.

1 “Anglo-Canadian law has resisted acknowledging any generalized and independent
2 doctrine of good faith performance of contracts.”²⁵ The court recognized that good faith
3 has been required under existing Canadian case law, but generally only with regard to
4 particular types of contracts, contractual provisions, or contractual relationships. It
5 noted that the source of such good faith obligations has been unclear; that is, it is not
6 clear whether the good faith obligation is being imposed in such cases as a matter of
7 law, a matter of implication, or a matter of interpretation.²⁶ The court went on to
8 recognize that there is an “overarching organizing principle” of good faith present in the
9 existing case law applicable to certain situations and noted that development of this
10 general principal should stem from existing law, but it declined to apply a broad good
11 faith duty in all contractual situations.²⁷ Instead, it adopted a narrower “duty of honesty
12 in contractual performance” for all contracts, meaning that the “parties must not lie or
13 otherwise knowingly mislead each other about matters directly linked to the
14 performance of the contract.”²⁸ That is, the parties must be honest with each other in
15 relation to the performance of their contractual obligations.²⁹

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20 Plaintiffs’ complaint does not set forth sufficient facts to support a good faith
21 claim under this newly articulated duty to act honestly in the performance of contractual
22 obligations. There are no allegations that Taymor Canada or Taymor USA actively lied

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24 ²⁵*Bhasin v. Hrynew*, 2014 SCC 71, Para. 32 (Can.).

25 ²⁶*Id.* at Para. 48.

26 ²⁷*Id.* at Para. 69.

27 ²⁸*Id.* at Para. 73.

28 ²⁹*Id.* at Para. 93.

1 about matters *directly linked to their obligations under the contract*. Indeed, as noted
2 above, the Mason Agreement was primarily a purchase and sale agreement. There is
3 no allegation that Zalkow did not receive the required payments or that Taymor Canada
4 otherwise failed to honestly perform any of its obligations under the agreement. The
5 specific allegations set forth in paragraphs 40 - 46 of the amended complaint do not
6 allege active dishonesty as to matters directly linked to the Mason Agreement.
7

8 Plaintiffs argue that other Canadian cases have recognized a more expansive
9 duty of good faith, but the court in *Bhasin* specifically declined to adopt a broad duty of
10 good faith for every contract.³⁰ The court recognized that in *some particular*
11 *circumstances* good faith might require more than just honesty on the part of a
12 contracting party—such as in cases where one party has discretionary power, when the
13 parties must engage in some level of cooperation under the contract, when one party
14 uses its contractual power to evade its obligations under the contract, or in employment,
15 insurance, or tendering contexts—but it emphasized that existing case law delineates
16 when and how to give good faith effect in such particular circumstances.³¹ For
17 example, the court specifically discussed the case *Dynamic Transport Ltd. v. O.K.*
18 *Detailing Ltd.*³² and stated that, because the contract there involved a condition
19 precedent to a sale of property, good faith required something more than just honesty; it
20 required that the responsible party take reasonable steps to achieve the condition
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26 ³⁰*Id.* at Para. 89.

27 ³¹*Id.* at Paras. 47-56, 93.

28 ³²[1978] 2 S.C.R. 1072 (Can.).

1 precedent.³³ However, the circumstances present in *Dynamic Transport* are not alleged
2 in plaintiffs' complaint. Indeed, plaintiffs do not allege the Mason Agreement involved
3 any of the particular circumstances discussed in *Bhasin* that would justify the
4 application of a more expansive duty of good faith.
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6 **E. Amendment**

7 Throughout their response plaintiffs ask for leave to amend the complaint further
8 to fix any deficiencies. However, they have not attached a proposed amendment for
9 the court's consideration.³⁴ Thus, the court cannot determine whether granting leave to
10 amend would be futile. Moreover, the time for filing motions to amend has passed.
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12 **VI. TENTATIVE CONCLUSION**

13 Based on the preceding discussion, defendants' motion at docket 36 should
14 likely be GRANTED as follows: Count One of plaintiffs' complaint should be dismissed
15 as to Taymor Canada. Count Two of plaintiffs' complaint should be dismissed to the
16 extent it seeks injunctive and declaratory relief. Count Three should be dismissed in its
17 entirety.
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19 DATED this 5th day of May 2015.
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22 /s/ JOHN W. SEDWICK
23 SENIOR UNITED STATES DISTRICT JUDGE
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26 _____
27 ³³*Bhasin*, 2014 SCC 71, Para. 89.

28 ³⁴L.R. Civ. 15.1(a).