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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RAYMAT MATERIALS, INC., a
California corporation,

Plaintiff,

v.

A&C CATALYSTS, INC., a New Jersey
corporation,

Defendant and Third-Party
Plaintiff,

v.

PROTAMEEN CHEMICALS, INC., a
New Jersey corporation,

Third-Party Defendant.

No. C 13-00567 WHA

**ORDER DENYING
MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT,
DENYING REQUEST TO AMEND
SCHEDULING ORDER, AND
VACATING HEARING**

INTRODUCTION

In this breach-of-contract action, plaintiff moves — nine months late and two months before trial — to file a second amended complaint adding three fraud claims. For the reasons stated herein, the motion is **DENIED**. The hearing on May 1 is **VACATED**.

STATEMENT

1
2 In February 2013, plaintiff Raymat Materials, Inc. filed a five-page complaint alleging
3 breach-of-contract and sought declaratory relief. Raymat filed a first amended complaint in May
4 2013 to append the exclusive supply agreement, the underlying contract for the breach by which
5 it had agreed to supply lauroyl lysine to A&C Catalysts, Inc. (Dkt. No. 15).

6 A May 2013 case management order set a number of deadlines including: initial
7 disclosures by May 17, 2013, and leave to add any new parties or *pleading amendments by June*
8 *28, 2013* (Dkt. No. 16).

9 Nine months after the deadline for pleading amendments and just two weeks before the
10 close of fact discovery, Raymat moved for leave to file a second amended complaint to add three
11 fraud-related claims — intentional misrepresentation, false promise, and declaratory judgment
12 that the agreement was null and void (Dkt. No. 56). Raymat amended its motion to request a
13 modification of the scheduling order to allow the amendment shortly after (Dkt. No. 61).

14 Ten days later, Raymat moved for summary judgment (Dkt. No. 64). Trial is scheduled for
15 June 2014.

16 * * *

17 Central to the parties’ dispute is the exclusive supply agreement and the alleged failure
18 by A&C Catalysts to purchase 24 metric tons of lauroyl lysine per year from Raymat.

19 In emails, dated October 26–27, 2010, Jim Turner from Raymat stated to John Wolfe
20 from A&C Catalysts:

21 John, hope all is well, I know that you haven’t heard from either
22 Jibing or I in a while, but I wanted to let you know that we have
23 begun bringing in higher volumes of LL with our new
24 manufacturing capabilities . . . *I would like to quote you and see if
we could support your efforts again.*

(Li Decl. Exh. A) (emphasis added). “LL” is lauroyl lysine.

25 John Wolfe responded: “*Please quote me on a usage number of 6,000 lbs a month &*
26 *growing.* This business for Raymat could start 12/1/10” (*ibid.*) (emphasis added). Six-thousand
27 pounds is 2.7 metric tons.

1 Jim Turner responded: “John, we can offer \$46.20Kg, 30 day terms. Let me know and
2 we can review your volumes and timing” (*ibid.*).

3 In November 2010, Jim Turner (Raymat) stated in an email:

4 John, hope all is well, I left you a message on your mobile . . . We
5 need to talk. As I’ve mentioned I have the volume now that we
6 originally talked about . . . Raymat has 2 new ventures that are
7 taking up much of our time. *We originally fell down on the volume*
8 *commitment to you and now we would prefer to try and move the*
9 *volume to a single person that can take 2–3 tons monthly . . . If we*
10 *can move this volume through you I would be willing to roll back*
11 *your price to \$42.60/kilo for the next 10 tons purchased . . . 30 day*
12 *terms . . . I would prefer doing it this way as opposed to marketing*
13 *the product directly . . . we can talk further commitment as needed.*

14 (Li Decl. Exh. B) (ellipses in original, emphasis added).

15 In 2011, Raymat and A&C Catalysts entered into an exclusive supply agreement.

16 Exhibit A to the agreement stated:

| | |
|----------------------------------|------------|
| 17 Products | 4/7/2011 |
| 18 Lysine | \$42.40/kg |
| 19 Purchase Quantities minimums; | 1 MT |
| 20 Annual Volume Commitment | 24 MT |

21 (Li Reply Decl. Exh. D). MT stands for metric ton. John Wolfe signed for A&C Catalysts and
22 Jim Turner signed for Raymat.

23 * * *

24 When John Wolfe was deposed in March 2014, he testified as follows:

25 Q. So on October 27, 2010, which is the date of this email, you
26 asked Raymat to give you a quote for the volume of 2.7 metric ton
27 per month and growing, correct?

28 A. Yes, I did.

Q. *Where did you get that volume figure?*

A. *I pulled it out of the air.*

Q. So you had no basis to make that statement about the volume
of 2.7 metric ton per month?

MR. CHANG: Objection. That’s not what his --
mischaracterization of his answer.

Q. You may answer, sir.

1 A. For me it's standard business practice to go out and throw
2 numbers out and try to get the best pricing I can.

3 Q. You say as best as you can. Is there any basis for that
4 monthly volume of 2.7 metric ton?

5 A. Not that I remember.

6 (Wolfe Dep. at 68–69) (emphasis added). Six-thousand pounds is 2.7 metric tons.

7 This order pauses to note that the excerpts from John Wolfe's deposition can be found
8 appended to A&C Catalysts' opposition. Raymat failed to even append the transcript to its
9 motion. Raymat argues that "[i]t is sufficient for Counsel to summarize the relevant testimony to
10 inform the court of the essence of the testimony that triggered the need for the proposed
11 amendment" (Reply 5). This is wrong. Please append the relevant transcripts or source
12 documents in the future.

13 In Raymat's four-page motion for leave to file a second amended complaint, Raymat
14 argues that these lines of Wolfe's testimony provide the basis for the new proposed fraud claims.
15 In its reply, Raymat states: "Right after the deposition, Raymat filed the instant Motion based on
16 Mr. Wolfe's deposition testimony that he pulled the 2.7 MT per month volume out of thin air"
17 (Reply 1). Raymat's theory is that A&C Catalysts lied to get a good price when it had no
18 intention of honoring a 24 metric ton per year commitment.

19 ANALYSIS

20 The case management order listed June 28, 2013, as the deadline for filing amendments.
21 After an amendment deadline passes, a scheduling order may be modified only for good cause.
22 *See* FRCP 16. Our court of appeals has held:

23 The pretrial schedule may be modified if it cannot reasonably be
24 met despite the diligence of the party seeking the extension. If the
25 party seeking the modification was not diligent, the inquiry should
26 end and the motion to modify should not be granted.

27 *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (internal citations omitted).
28 If the movant is not diligent, the inquiry ends. *Johnson v. Mammoth Recreations, Inc.*,
975 F.2d 604, 607–08 (9th Cir. 1992).

1 No diligence has been shown by Raymat. This order finds no good cause for amending
2 the scheduling order to allow Raymat to add in three new claims. Raymat’s motion is more than
3 nine months late and fact discovery is currently closed.

4 Raymat mistakenly focuses on how quickly it moved to amend following the deposition.
5 This does not demonstrate diligence for the real dragging of the feet is Raymat’s utter failure to
6 propound any requests for production from *May 2013* (after initial disclosures were exchanged)
7 to *September 2013* (when Raymat served its first set of requests for production) and to wait until
8 *December 2013* to serve its deposition notice on John Wolfe, a key figure in this action.

9 No decent explanation is provided for this delay. It seems that Raymat waited until after
10 the ADR session concluded to begin propounding discovery requests. Court-ordered mediation
11 does not suspend the discovery schedule. The case management order stated:

12 While the Court encourages the parties to engage in settlement
13 discussions, please do not ask for any extensions on the ground of
14 settlement discussions or on the ground that the parties
15 experienced delays in scheduling settlement conferences,
16 mediation, or ENE. The parties should proceed to prepare their
cases for trial. No continuance (even if stipulated) shall be granted
on the ground of incomplete preparation without competent and
detailed declarations setting forth good cause.

17 (Dkt. No. 16). Raymat should have proceeded expeditiously. Perhaps, had it done so, it would
18 have “discovered” these three new fraud claims at a much earlier date.

19 Moreover, Raymat blows smoke, contending that the only reason the deposition took
20 place in March 3 was a result of A&C Catalysts inability to hold the deposition on January 22,
21 when it was initially noticed for by Raymat (Reply 1). The record does not reflect stalling by
22 A&C Catalysts and absent continuous efforts to delay, Raymat can hardly claim that an opposing
23 party’s inability to comply with an initial notice date set by an adverse party preserves diligence
24 in discovery. In any event, Raymat’s failure to be diligent dooms its tardy motion.

25 The foregoing is sufficient but there is more. These three new fraud claims arise from the
26 same contract signed by John Wolfe and Jim Turner. To bring on three new claims two months
27 before trial based on seven words in a deposition — “I pulled it out of the air” — is nonsensical.

28 In negotiations such as this where a minimum buy quantity is being negotiated, each side
is entitled to negotiate for whatever amount they can get away with. It is, after all, a contract

1 negotiation and neither side wants to leave “money on the table.” There is nothing inherently
2 wrong with one side or the other bargaining for a higher/lower amount than what they would be
3 willing to accept. It is okay in a negotiation, therefore, for one side or the other to “pull a
4 number out of the air” as their starting point, or intermediate point, or even end point. Neither
5 side is required to lay bare its negotiating strategy. This is America and the other side is free to
6 walk away if they do not like it.

7 Perhaps a false promise is actionable as a species of fraud but the deposition snippet falls
8 short of suggesting fraud and is consistent with innocent negotiations. At this very late hour in
9 the case, the snippet is simply not enough to scrap the schedule and to dive back into discovery.


10 Since the foregoing reasons are sufficient to deny Raymat’s motion, this order need not
11 reach the merits of the bad faith, prejudice, FRCP 12(b), and FRCP 9(b) arguments.

12 **CONCLUSION**

13 For the foregoing reasons, Raymat’s motion for leave to file a second amended complaint
14 is **DENIED**. The request to amend the scheduling order is **DENIED AS MOOT**. The hearing on
15 May 1 is **VACATED**.

16
17 **IT IS SO ORDERED.**

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19 Dated: April 22, 2014.

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22 WILLIAM ALSUP
23 UNITED STATES DISTRICT JUDGE
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