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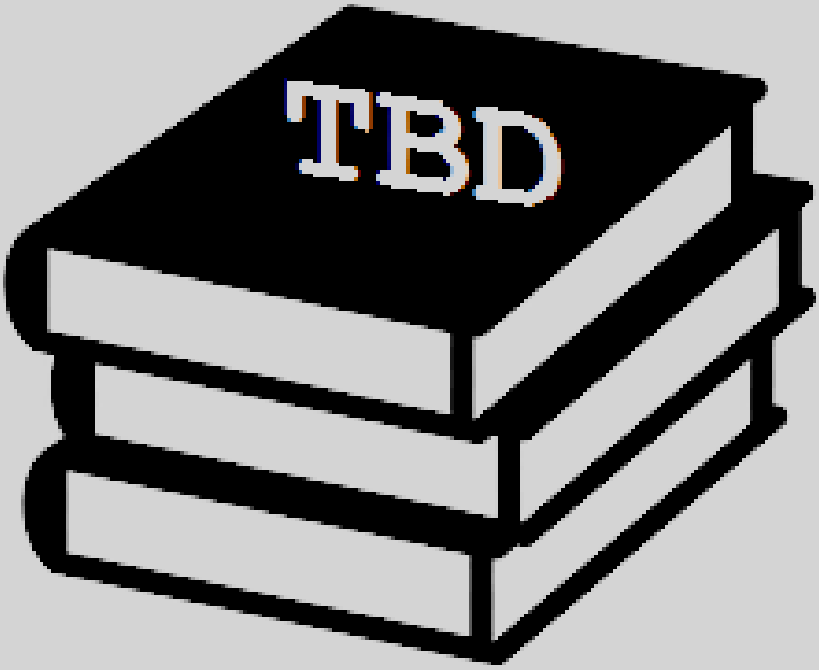

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TRUCK-LITE CO., INC., Plaintiff, vs. GS1 US, INC., f/k/a UNIFORM CODE COUNCIL, INC. Defendant and Third Party Plaintiff, vs. FEDERAL MOGUL CORPORATION, Third Party Defendant.	:	CIVIL ACTION Case No: 1:07-cv-00068-RJA(Sc) **GS1 US Inc.'s Reply In Support of Its Motion For Leave To File Amended Counterclaim and Third Party Complaint**

I. Introduction

A fundamental precept of the Federal Rules of Civil Procedure mandates that pleadings shall be liberally construed to further the interests of justice. In this case, the interests of justice require that Federal-Mogul Corporation ("Federal") be part of this litigation, and GS 1 US Inc.'s ("GS1 US") claims be permitted to proceed. In urging this Court to deny GS 1 US's Motion for Leave to Amend Counterclaims and Third Party Complaint ("Proposed Amendment"), Federal simply recounts the same tired arguments asserted in its motion to dismiss. Not only does GS1 US state legally cognizable claims against Federal, logic and common sense dictate that Federal should be part of this case. Truck-Lite sued GS 1 US because it claims GS1 US wrongfully transferred the company prefix 614046 ("Company Prefix") to Federal. GS1 US did so based on the representations made by Federal. If Truck-Lite is correct that it obtained the exclusive right to use the Company Prefix in the Asset Purchase Agreement, then Federal's representations were misrepresentations. In short, this case cannot be decided without a judicial determination of

which of these two parties "owns" this number. GS1 US's motion should therefore be granted, and this case should proceed to a determination on the merits.

II. Argument

A. Applicable Standards

Permission to amend should be freely granted, although the district court has discretion to deny leave to amend "where the motion is made after an inordinate delay, no satisfactory explanation is made for the delay, and the amendment would prejudice the defendant. See Fed.R.Civ.P. 15(a); Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). But, when the only opposition to a motion for leave to amend is based on futility, justice demands that leave to amend should not be denied if the proposed amendment presents colorable grounds for relief that will withstand a motion to dismiss. See Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 88 (2d Cir. 2002) (quotations omitted); Raster v. Modifications System, Inc., 731 F.2d 1014, 1018 (2d Cir. 1984)(To survive a motion to dismiss, a proposed claim need only be "colorable"). This Court thus must accept as true all of the proposed pleading's factual allegations and draw all reasonable inferences in favor of the GS1 and only deny its motion for leave to amend on a valid ground. Foman, 371 U.S. at 182.

Here, Federal does not, nor can it, contend that GS1 US's proposed amendment will delay this litigation or unduly prejudice Federal in its defense. Rather, Federal's *only* attempt to defeat GS1 US's proposed amendment is to argue futility. Worse yet, Federal arguments are based on the same arguments it raised in its dismissal papers related to the original Complaint, seemingly without having considered GS1's proposed amendment. (Truck-Lite has not opposed GS1 US's proposed amendment and never joined in Federal's motion to dismiss.) A plain reading of GS1 US's proposed amendment will reveal that this Court should not deny GS1 US's motion of leave to amend on the grounds of futility – the only basis asserted in Federal's opposition. After accepting the factual allegations as true and drawing all reasonable inferences

in favor of the GS1, there is no valid ground to conclude that GS1 US's claims, as set forth in the Proposed Amendment, fail to present colorable grounds for relief sufficient to withstand a Rule 12(b)(6) motion.

B. GS1 US's States A Meritorious Claim of Negligent Misrepresentation.

1. As a Subscriber, Federal Owed GS1 US A Duty To Supply Accurate Information.

Federal predicates its self serving futility argument on an extremely narrow interpretation of the tort of "negligent misrepresentation," one that is not supported by the case law. Urging the application of New York law, which has no applicability between GS 1 US (a New Jersey and Ohio organization) and Federal (a Michigan corporation), Federal claims it did not owe a duty to GS 1 US to provide accurate information. But contrary to that shallow analysis, the law does not permit Federal to lie to GS 1 US with impunity.

The duty of due care Federal owed GS1 US – to supply accurate information concerning the rights to the Company Prefix – is adequately pled in the proposed amendment. (Proposed Amendment, Doc. 35, ¶¶ 49-55). Under Ohio law, one who supplies information for the guidance of another in a business transaction must use reasonable care in providing accurate information. Sito v. Jackshaw Pontiac, Inc., 127 Ohio App.3d 389, 713 N.E.2d 40, 43 (Ohio 1998)(citations omitted). Contrary to Federal's analysis, a duty to convey accurate information to others is not limited to professionals, such as lawyers and accountants and their clients, but exists in a variety of business transactions. For example, a duty exists between heirs of an insured and an insurance agent, Merrill v. William E. Ward Ins., 87 Ohio App.3d 583, 622 N.E.2d 243 (Ohio App. 10 Dist., 1993), and even between the seller of trucks and the purchaser, Nat'l Mulch and Seed, Inc. v. Rexius Forest By-Products, Inc., 2007 U.S. Dist. LEXIS 24904, (S.D.Ohio March 22, 2007)).

Here, a duty exists between a subscriber and the not-for-profit organization, which administers company prefixes based on the accuracy of information provided by those subscribers. "As subscribers to GS1 US, both Truck-Lite and Federal owed a duty to GS1 US to use reasonable care to provide accurate information to GS1 US when annunciating information about their subscribers." (Proposed Amendment, Doc. 35, ¶¶ 55, 87). GS1 US also provides context to these allegations by alleging additional facts:

> Manufacturers, wholesalers and retailers [such as Federal] subscribe to GS1 US by paying annual subscriber dues. By joining GS1 US, subscribers obtain numerous benefits to assist them in selling and purchasing products. GS1 US subscribers and the benefits thereof are subject to GS1 US's rules and regulations.
>
> …….
>
> The success of GS1 US's business and the supply chain standards that it develops for its subscribers depends on its subscribers providing accurate information to GS1 US. When subscribers join GS1 US, they agree to provide complete and accurate information on their respective businesses. GS1 US subscribers also agree to accurately supplement certain material information so that GS US's records are up to date.

(Proposed Amendment, Doc. 35, ¶¶ 48, 50). Taking these facts as true, GS1 US has properly pled Federal's duty.

No special relationship is required under the Ohio law. Nat'l Mulch and Seed, Inc., 2007 U.S. Dist. LEXIS 24904, *37 (flatly rejecting the argument that a plaintiff must plead the existence of a special relationship and stating that "a 'special relationship' is not a formal element of a claim for negligent misrepresentation under the law of Ohio.") Even if a special relationship was deemed to be required, Federal cannot ignore the allegations contained in the Proposed Amendment. Riel v. Morgan Stanley, No. 06 CV 524 (TPG), 2007 U.S. Dist. LEXIS 11153, *36 (S.D.N.Y. Feb. 16, 2007). Federal provides not a single argument or application of fact to the abstract concept of a "special relationship." Contrary to Federal's bald assertions,

New York courts have gone so far as to hold that a "special relationship may be found in an arms-length commercial transaction." In re Rickel & Associates, Inc. v. Smith, et al., 272 B.R. 74, 103 (S.D.N.Y. 2002) (citations omitted). Nonetheless, "[c]ourts in this circuit have held that a determination of whether a special relationship exists is highly fact-specific and generally not susceptible to resolution at the pleadings stage." Nasik Breeding & Research Farm Ltd. v. Merck & Co., 165 F.Supp.2d 514, 536 (S.D.N.Y. 2001); see also Polycaset Technology Corp. v. Uniroyal, Inc., 792 F.Supp. 244, 268-69 (S.D.N.Y. 1992). The simple reason for this is that "[t]he 'special relationship' concept must be adaptable to numerous contexts, and turns on the facts of each case" and therefore "whether or not a special relationship exists should not be raised early in a litigation." Polycaset., 792 F.Supp. at 268-69. Whether the Court applies Ohio or New York law, Federal's argument that GS 1 US has failed to properly plead the duty element of its negligent misrepresentation claim fails. (Proposed Amendment, Doc. 35, ¶¶ 48, 50).

2. Federal Misrepresented Its Rights To The Company Prefix.

Federal argues that GS1 US's proposed pleading fails to allege a false statement and therefore is futile. That argument has no basis in fact. If Federal had bothered to read the Proposed Amendment, it would have discovered that GS1 US explicitly alleges Federal made false statements to GS1 US. (Proposed Amendment, Doc. 35, ¶¶ 73, 84 and 90).

3. GS1 US Reasonably Relied Upon Federal's Misrepresentation.

Federal also attempts to escape liability for GS1 US's damages by contending without merit that GS1 US did not reasonably rely on Federal's false representations. Federal's assertion is illogical and unpersuasive. GS1 US is a non-profit issuer of the Company Prefix, with no interest in which party held the rights to the Company Prefix, except to the extent a transfer of rights would effect the accuracy of GS1 US's books and records. (Proposed Amendment, Doc. 35, ¶¶ 53-55). GS1 US relies exclusively on the information provided to it by its subscribers in transferring the prefixes. Such was the case here when GS1 US relied on the truthfulness of

Federal's statements that it was the exclusive "owner" of the Company Prefix, when GS1 US transferred that number back to Federal from Truck-Lite.

In any event, where there exists a foundation for an inference of reasonable reliance, the issue is one generally left to the trier of fact. McCarthy, Lebit, Crystal & Haiman Co., L.P.A. v. First Union Management, Inc., et al, 87 Ohio App.3d 613, 622 N.E.2d 1093 (Ohio App. 8 Dist., 1993)(overruling trial court's dismissal of negligent misrepresentation claim because reasonable reliance is a question of fact for the jury); Shinabarger v. United Aircraft Corp., 381 F.2d 808 (2d Cir. 1967)(overruling trial court's dismissal of negligence claim because reliance was an issue for the jury); National Western Life Ins. Co. v. Merrill Lynch, et al., 2004 WL 57748 (2d Cir. Jan. 12, 2004)(overruling trial court's dismissal on reliance grounds in context of a fraud claim). Consequently, Federal cannot escape the jury's determination of this issue.

C. GS1 US Properly Seeks Indemnification and/or Contribution From Federal.

GS1 US is entitled to indemnification and/or contribution of any judgment entered in favor of Truck-Lite. In Ohio, "[t]he rule of indemnity provides that 'where a person is chargeable with another's wrongful act and payment damages to the injured party as a result thereof, he has a right of indemnity from the person committing the wrongful act." Satterfield v. St. Elizabeth Health Center, 159 Ohio App.3d 616, 824 N.E.2d 1047, 1050 (Ohio App. 2005) (citations omitted); Ohio Fuel Gas Co. v. Pace Excavating Co., 187 N.E.2d 89, 94 (Ohio App. 1963). When the right to indemnification is implied, plaintiff must allege and demonstrate defendant's wrongful act.[1] Id. Likewise, even though Truck-Lite has not sued Federal directly, GS1 US is entitled to contribution against Federal for its negligent misrepresentation. Henry v.

[1] Likewise under New York law, which is substantially similar to that of Ohio on this issue, GS1 US asserts a valid claim for implied indemnification. Vista Fee Associates v. Teachers v. Teachers Ins. and Annuity Ass'n. of America, 259 A.D.2d 75, 80-81, 693 N.Y.S.2d 554 (1st Dept. 1999) (reversing lower court's dismissal of claim for implied indemnification).

Consolidated Stores International Corp., 89 Ohio App.3d 417, 423 (Ohio App. 1993); Raquet v. Braur, 90 N.Y.2d 177, 240, 681 N.E.2d 404, 408 (N.Y. 1997).

GS1 US properly seeks implied indemnity and contribution from Federal by pleading that Federal negligently misrepresented to GS1 US its purported exclusive right to use the Company Prefix in January 2007. (Proposed Amendment, Doc. 35, ¶¶ 99-106). If not for Federal's misrepresentation, GS1 US would not have transferred the rights to the Company Prefix back to Federal, and Truck-Lite would not have commenced suit against GS1 US for the cost of re-labeling its products with a different company prefix. (Proposed Amendment, Doc. 35, ¶¶ 75, 101-102). Even though Truck-Lite did not sue Federal directly, Federal cannot escape the consequences of its actions. Federal either is primarily liable for the harm allegedly caused to Truck-Lite, and thus is liable in indemnification to Federal, or must contribute its pro rata share of Truck-Lite's alleged damages.

D. GS1 US Properly Seeks A Declaratory Judgment

In the Proposed Amendment, GS1 US states a valid request for a declaratory judgment under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, as to whether Truck-Lite or Federal has the exclusive right to use the Company Prefix. (Proposed Amendment, Doc. 35, ¶¶ 91-98). "A declaratory judgment is a remedy. Its availability does not the create an additional cause of action or expand the range of factual disputes that may be decided by a district court sitting in diversity." Richards v. Select Ins. Co., Inc., 40 F.Supp.2d 163 (S.D.N.Y. 1999). Federal suggests that GS1 US seeks an advisory opinion from the Court as to whether Truck-Lite or Federal holds the rights to the Company Prefix. This assertion contradicts the injuries pled by GS1 US in its Proposed Amendment, which to date include the costs of defense of the litigation brought by Truck-Lite and the prospect of having to pay damages to Truck-Lite.

When the question of standing is raised in the context of the Federal Declaratory Judgment Act, as a challenge to the plaintiff's right to declaratory relief, the plaintiff must demonstrate compliance with Article III of the Constitution. Article III provides a court with jurisdiction to issue declaratory judgment only when an actual controversy exists versus a future possibility and requires plaintiff to demonstrate "(1) an injury in fact that is actual or threatened; (2) causal connection between the defendants' conduct and the alleged injury; and (3) a substantial likelihood that the injury will be redressed by a favorable decision." Suster v. Marshall, 121 F.Supp.2d 1141, 1146 (N.D. Ohio 2000)(relying on Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992); see also MedImmune, Inc. v. Genetech, Inc., 127 S.Ct. 764, 771, 166 L.Ed.2d 604 (2007).[2]

GS1 US meets the Article III requirements for standing. Truck-Lite has already commenced a lawsuit against GS1 US, and that lawsuit has already caused GS1 US to incur costs to defend against those claims. GS1 US will continue to incur costs until this litigation is resolved and may have to pay damages if Truck-Lite is successful in its claims. (Proposed Amendment, Doc. 35, ¶ 96). Truck-Lite's claims against GS1 US are not mere threats, but rather are actual injuries, the cost of which continue to grow.

GS1 US pleads that but for Federal's misrepresentation to GS1 US in January 2007, GS1 US would not have transferred the rights to the Company Prefix from Truck-Lite to Federal. (Proposed Amendment, Doc. 35, ¶ 101-102). But for GS1 US's reliance on Federal Mogul's misrepresentation, Truck-Lite would not have sued GS1 US. (Proposed Amendment, Doc. 35, ¶ 101-102). Finally, GS1 US's injury will be redressed if this Court issues a declaratory judgment as to which party holds the rights to the Company Prefix. If the Court holds that Truck-Lite has

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[2] New York courts similarly require a party to meet Article III standing, which incorporates the concept of ripeness of the controversy. See, e.g., Dow Jones & Co., Inc. v. Harrods, Ltd., 237 F.Supp.2d 394, 407-08 (S.D.N.Y. 2002).

the right to the Company Prefix, then GS1 US's negligent misrepresentation against Federal Mogul will succeed.

GS1 US's request for relief in the form of a declaratory judgment is not a request for declaration of rights under a contract to which GS1 US is not a party. Neither GS1 US nor Truck-Lite has asserted claims of breach of contract, rather, all the claims asserted in this litigation sound in tort. (Complaint, Doc. 1 at ¶¶ 14-35; Proposed Amendment, Doc. 35, ¶¶ 82-90). Two of GS1 US's subscribers have represented that they are the exclusive "owner" of the Company Prefix. Both representations cannot be true. GS1 US has an interest in maintaining and ensuring the accuracy of its records concerning what entities hold the rights to use its company prefixes, and GS1 US is entitled to a ruling from this Court as to which of its members conveyed to it accurate information and which conveyed inaccurate information.[3] Until this Court enters judgment as to the rights to the Company Prefix, GS1 US is at risk of direct injury from Truck-Lite's assertion that GS1 US improperly assigned rights to the Company Prefix to Federal. (Proposed Amendment, Doc. 35, ¶ 96). Further, a determination of rights to the Company Prefix is also necessary to resolve plaintiff Truck-Lite's claims in the original action. For these reasons, leave to file GS1 US's Proposed Amendment should be granted.

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[3] A party's right to plead in the alternative, regardless of the consistency of the claims, is well-settled. Fed.R.Civ.P. 8(3)(2); Universal Contracting Corp. v. Aug, 2004 WL 3015325 (Ohio App. 1 Dist. Dec. 30, 2004); Adler v. Pataki, 185 F.3d 35, 41 (2d Cir. 1999).

III. **Conclusion**

WHEREFORE, defendant/third party plaintiff GS1 US, Inc. respectfully requests that this Court grant its unopposed motion for leave to amend its counterclaims against Truck-Lite, and its motion for leave to amend its third party complaint against Federal.

Respectfully,

Dated: August 24, 2007

*/s/ Thomas B. Fiddler*_____

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CERTIFICATE OF SERVICE

I, Mia Meloni, an attorney duly admitted *pro hac vice* to practice law in the in the United States District Court for the Western District of New York, hereby certify that on this date, the foregoing GS1 US, Inc.'s Reply To Federal Mogul Corporation's Opposition to GS1 US's Motion For Leave To File An Amended Counterclaim and Third Party Complaint were electronically filed, and were served electronically upon:

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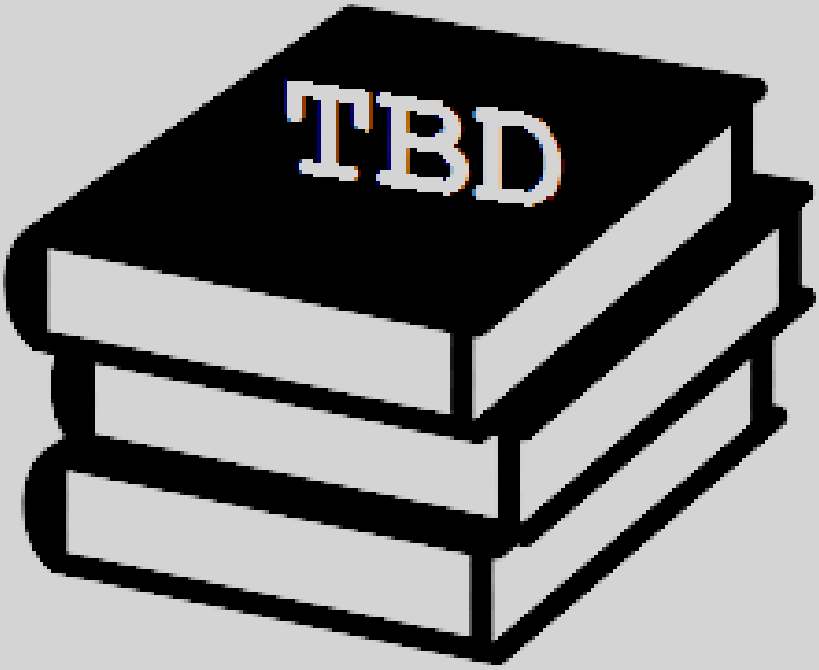

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