

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

AIR PRODUCTS AND CHEMICALS,)	
INC.)	
Plaintiff,)	
)	
v.)	
)	C.A. No.: 10C-12-243 FSS
ROBERTS OXYGEN COMPANY, INC.,)	CCLD
LINDE NORTH AMERICA, INC., and)	(E-FILED)
LINDE LLC,)	
Defendants.)	

Corrected: November 30, 2011

CORRECTED ORDER *

**Upon Defendant Roberts Oxygen’s Motion to Dismiss -
GRANTED in part and *DENIED* in part
Upon Defendants Linde North America and Linde LLC’s Motion to Dismiss -
*GRANTED.***

Although Roberts Oxygen had an all-requirements contract with Air Products for helium, Roberts started buying helium from Linde North America. Air Products sued Roberts and Linde for: three breaches of contract, tortious interference with contractual relations, and civil conspiracy. Air Products has pled facts sustaining a breach of contract claim: Roberts breached its contract by purchasing

*** Corrected as to Title only.**

from Linde. But, Linde appears to be innocent, even if the complaint is true. It is not alleged that Linde knew about the Air Products contract before it responded to Roberts's request for a proposal from Linde.

I.

Air Products, a Delaware corporation, specializes in supplying atmospheric gases, including helium. Roberts Oxygen, a Maryland corporation, specializes in compressed industrial, medical, and specialty gas distribution, including helium. Linde North America, Inc, a Delaware corporation, is Linde Group's U.S. operation. Linde LLC is a Delaware limited liability company that is now supplying helium to Roberts.

Helium has different grades, based on purity. Medical helium must comply with United States Pharmacopoeia standards and must have a Helium, USP designation on its label. Helium, USP is 99.0% pure and analyzed for air and carbon monoxide impurities. According to the complaint,

if helium is labeled medical, it can be resold as either medical or industrial helium. Industrial helium is purer than Helium, USP and analyzed for additional impurities. Industrial helium cannot be sold as medical grade helium, even if its purity exceeds Helium, USP's 99.0% requirement.

On or about July 1, 2008, Air Products and Roberts began a ten-year contract requiring Roberts to purchase its "entire and future requirements" of

“>99.995% Helium, USP” from Air Products. The customization meant that Roberts’s helium was an especially pure form of Helium, USP, which allowed Roberts to use it as medical or industrial helium without separate holding tanks.

When helium became more readily available, its price fell. Beginning in late 2009, Roberts repeatedly asked Air Products for a price modification and a shorter contract. On August 1, 2009, Air Products modified the price. The parties discussed dropping the price again in May 2010.

On June 15, 2010, Roberts sent out a request for quotation for “approximately one million cubic feet of industrial helium per month,” a volume similar to Air Products’s supply. On June 23, 2010, Air Products told Roberts its contract covered the RFQ. On June 25, 2010, Air Products reiterated its position, but Roberts was unmoved.

Linde responded to Roberts’s RFQ, and the parties signed a contract. On or about July 20, 2010, Linde began selling Roberts “Grade 5 Analytical helium,” which allegedly is similar to Air Products’s Helium, USP. The pleadings do not shed light on whether “Grade 5 Analytical helium” is a product common to the industry, or a customized product between Linde and Roberts.

On July 29, 2010, Roberts told Air Products it needed less Helium, USP due to changes at its cylinder filling plant, and did not buy any until May 2011. On September 1, 2010, Air Products notified Linde about its requirements contract and

provided details. On September 8, 2010, Linde replied, stating Air Products's contract only covered Helium, USP, not the "Grade 5 Analytical helium" that Linde was selling.

After unsuccessful mediation, Air Products sued its customer, Roberts, and its competitor, Linde, alleging: Roberts breached its Air Products contract by contracting with Linde, not discussing supply changes before submitting its RFQ, and breaching the implied covenant of good faith and fair dealing; Linde tortiously interfered with Air Products's contract; and Roberts and Linde conspired to take away Air Products's business.

II.

In a Rule 12(b)(6) motion to dismiss, the court must determine whether Air Products has stated a claim upon which relief can be granted. The court must accept all factual allegations in the complaint and deny the motion unless the plaintiff could not recover under any reasonably conceivable circumstances.¹

This case involves contract interpretation. Courts interpret contracts as a matter of law.² In contract disputes, Delaware courts look to the law of the state with the "most significant relationship" to the dispute.³ Air Products's contract with

¹ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

² *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997).

³ *Liggett Group Inc., v. Affiliated FM Ins. Co.*, 788 A.2d 134, 137 (Del. Super. 2001).

Roberts is governed by Pennsylvania law. If the results are the same under the different laws, it is a false conflict, and choice-of-law analysis is not needed.⁴

III.

Air Products alleges Roberts breached the contract. A breach of contract claim's elements are generally: (i) a contractual obligation between two parties; (ii) a breach; and (iii) damages.⁵

A.

Roberts claims there was no breach because the contract's express terms only require "Helium, USP" purchases. Air Products claims Roberts is only looking at the contract piecemeal, and the contract must be read as a whole.⁶ Air Products alleges Roberts must buy its "entire and future requirements of the materials identified in Section 1 of Attachment . . . A5."

The Air Products contract's Section 5 provides: "All product delivered by [Air Products] shall conform to the specifications set forth in Section 3 of the Attachments in [Attachment] A." Section 3 of Attachment A5 defines the helium as ">99.995% pure." Section 10.1 states, "[Air Products] warrants that the products

⁴ *Deuley v. DynCorp Intern., Inc.*, 8 A.3d 1156, 1160 (Del. 2010).

⁵ *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 548 (Del. Super. 2005).

⁶ *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

shall conform to the specifications set forth in Section 3 of the Attachments in Exhibit A.”

Looking at the contract’s terms, it appears Roberts promised to buy its entire and future “>99.995 pure Helium, USP” requirements from Air Products. Roberts responds that this only applies to Helium, USP purchases only, and the “Grade 5 Analytical Helium” Roberts is taking from Linde is not the same as Helium, USP, which Roberts must buy from Air Products.

Air Products also alleges its 30-year history with Roberts is evidence of a course of conduct where Roberts routinely bought customized Helium, USP for medical and industrial applications. Specifically, Air Products alleges,

By designating the helium as Helium, USP, but by also agreeing on specifications that exceed medical grade helium standards, the parties developed a course of dealing whereby all helium delivered by Air Products to Roberts could be used by Roberts for all of its helium needs. It was the parties’ long-standing practice for Air Products to provide all of its helium deliveries a certificate of analysis to certify a helium purity of 99.999%, which exceeds the level required for medical helium and is sufficient to meet industrial and analytical grade standards. Air Products provided the certificates of analysis at Roberts’s request to demonstrate that Air Products was meeting its purity obligations for Roberts’s higher-purity helium applications.

Put more generally, the contract does not merely cover Helium, USP. It actually covers a customized form of helium, and that product, not the “USP,” is what has to be compared to “Grade 5 Analytical Helium.” When the competing products are compared, especially in the light of Air Products and Roberts’s course of dealing, it can be said that the contract with Linde has unlawfully knocked-out Air Products’s contract with Roberts.

A course of dealing is a “sequence of conduct concerning previous transactions between the parties to a transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.”⁷ Course of dealing may help supplement or qualify terms of the agreement.⁸ As mentioned, Air Products’s pleadings allege a long-standing course of dealing with Roberts.

Air Products also alleges the parties’ course of performance from July 2008 - July 2010 supplements the contract’s terms.⁹ Specifically, Air Products alleges,

During that two-year span, Roberts purchased an average monthly volume of 1,028,045 standard cubic feet of helium, which exceeded Roberts’s requirement for Helium, USP alone.

⁷ 6 *Del. C.* § 1-303(b).

⁸ *Id.* at § 1-303(d).

⁹ *Id.*

In all instances, the helium met the contract specifications of '>99.995%' pure. In fact, for each delivery, Roberts required Air Products to provide a Certificate of Analysis showing, *inter alia*, 99.999% total helium purity.

Much like Delaware law, Pennsylvania law prefers the contract's express terms.¹⁰ But, Air Products's course of dealing and course of performance allegations might illuminate the contract and bring its terms into sharper relief.

B.

Air Products also alleges Roberts breached its contract by submitting an RFQ before discussing changes with Air Products. Air Products alleges its contract requires a review before "any product changes due to regulatory or industrial specification changes." The pleadings suggest Roberts's RFQ was due to changing needs, or, at least, changing market conditions, not regulatory or industrial specification changes.

Roberts's RFQ and discussions surrounding it may prove relevant to the contract's eventual breach. They do not, however, amount to a claim here. Here, the deal has been done. Roberts's buying helium from Linde is either a breach, or not. That is Air Products's claim. The same goes for Air Products's good faith and fair

¹⁰ *Id.* at § 1-303(e)(1); *see also* 13 Pa. Cons. Stat. Ann. §1303(e)(1).

dealings claim. They are subsumed in the Air Products's breach of contract claim.¹¹

IV.

Air Products alleges Linde tortiously interfered with its contract. Generally, Air Products must allege: (i) there is a contract; (ii) about which Linde knew; and (iii) an intentional act that is a significant factor in causing the breach; (iv) without justification; (v) which causes injury.¹²

Air Products alleges, "Upon learning Linde was selling Roberts helium, Air Products informed Linde that Roberts was obligated to purchase helium from Air Products pursuant to the contract and provided Linde with relevant portions." Air Products also alleges, "Linde responded to [Roberts's] RFQ and subsequently entered into a contract. It is reasonable to assume that Linde knew of Air Products's [30 year] relationship with Roberts." Air Products has not alleged Linde actually knew about Air Products's existing contract when it contracted with Roberts. Linde did not tortiously interfere with Air Products because Roberts unilaterally sent an RFQ to Air Products and other companies, and contracted with Linde.¹³

¹¹ *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 441 (Del. 2005).

¹² *Aspen Advisors LLC v. UA Theatre Co.*, 861 A.2d 1251, 1265-1266 (Del. 2004).

¹³ Restatement (Second) of Torts §766, cmt. n (1979) ("One does not induce another to commit a breach of contract with a third person . . . when he merely enters into an agreement with the other.").

Air Products also cannot allege Linde tortiously interfered after it received contract details.¹⁴ Interference must be intentional, not an independent action's consequence.¹⁵ Thus, even if Linde now knows it is interfering with Air Products's contract, it cannot be held liable if the incidental interference were not intentional. Looking at the pleadings, Air Products has not presented facts conceivably supporting tortious interference.

V.

Air Products also alleges Roberts and Linde committed civil conspiracy. To state a civil conspiracy action, Air Products must generally allege: (i) a confederation or combination of two or more persons; (ii) an unlawful act done in furtherance of the conspiracy; and (iii) actual damage.¹⁶ There must also be an underlying cause of action.¹⁷

Looking at the pleadings, Linde has not committed civil conspiracy. As explained above, there is no underlying cause of action against Linde. Second, Air

¹⁴ *Id.* at cmt. i (“To be subject to liability, . . . an actor must have knowledge of the contract . . . and of the fact that he is interfering with the performance of the contract.”).

¹⁵ *Id.* at cmt. j (“If the actor is not acting [with wrongful means], the fact that he is aware that he will cause interference with the plaintiff's contract may be . . . a minor and incidental consequence.”).

¹⁶ *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149-50 (Del. 1987)

¹⁷ *Ramunno v. Cawley*, 705 A.2d 1029, 1039 (Del. 1998).

Products's civil conspiracy claim against Roberts fails because it cannot prove that Linde and Roberts engaged in an unlawful act furthering the conspiracy. Air Products's only allegation is, "Roberts and Linde's wrongful collusion has deprived Air Products of its reasonable expectations under the Contract with regard to sales of helium," that is based solely on Linde's selling Roberts substantially similar helium.

VI.

For the foregoing reasons, Roberts's motion to dismiss is **GRANTED** as to the implied covenant of good faith and fair dealing, the pre-breach discussion requirement, and the civil conspiracy claims, and **DENIED** as to the breach of contract claim. Linde's motion to dismiss is **GRANTED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

cc: Prothonotary (Civil)
pc: Kenneth J. Nachbar, Esquire
John P. DiTomo, Esquire
John C. Phillips, Jr., Esquire
Megan C. Haney, Esquire
Brian E. Farnan, Esquire