

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

MARGARET LEE, on behalf of herself and all)
others similarly situated,)

Plaintiff,)

v.)

CONAGRA BRANDS, INC., ROCHE BROS.)
SUPERMARKETS, INC., ROCHE BROS.)
INC., ROCHE BROS. SUPERMARKETS,)
LLC, and THE STOP & SHOP)
SUPERMARKET COMPANY LLC,)

Defendants.)

**CIVIL ACTION NO.
NO. 1:17-CV-11042-NMG**

**CONAGRA'S RESPONSE IN OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO AMEND COMPLAINT**

Plaintiff's years-late attempt to amend her complaint to conform to the proper requirements of Chapter 93A should be denied. Plaintiff last filed an amended complaint in this case in July 2017. Only now, after Conagra has moved this Court for summary judgment, does Plaintiff request a *third* bite at the pleading apple. But Plaintiff falls woefully short of providing "substantial and convincing evidence to justify a belated attempt to amend [her] complaint." *Steir v. Girl Scouts of the USA*, 383 F.3d 7, 12 (1st Cir. 2004). Clear First Circuit precedent explains that post-summary judgment motions to amend are disfavored and must meet this heightened standard. *Id.* Here, Plaintiff did not even attempt to satisfy that higher standard by providing "*substantial and convincing evidence* to justify" her amendment. As the First Circuit explained in *Steir*: "Regardless of the context, the longer a plaintiff delays, the more likely the motion to amend will be denied, as protracted delay, with its attendant burdens on the opponent and the court, is itself a sufficient reason for the court to withhold permission to amend." *Id.*

Plaintiff has filed her motion to amend only in the face of Conagra's pending summary judgment motion. *See* ECF No. 86, at 2 ("Plaintiff is prepared to amend her complaint to ... negate[] entirely any conceivable basis to dismiss the case...."). In so moving, Plaintiff continues her transparent attempts to muddy the waters on that issue by continuing to assert that "no demand was required" while at the same time arguing that "her demand complied with Chapter 93A" and therefore Conagra should be prejudiced for not responding to that demand. *See id.* at 3. What Plaintiff fails to recognize is that Conagra offered Plaintiff an opportunity to cure the deficiencies caused by her deficient demand letter before Conagra moved for summary judgment. *See* ECF No. 70, at 3-4. Plaintiff refused that offer to cure. Notably "failure to cure deficiencies" is one of the bases for denying leave to amend, even under the more liberal interpretation of Rule 15(a) espoused in *Foman v. Davis*, 371 U.S. 178, 182 (1962). So too is "undue delay." *Id.* Because

Plaintiff failed to cure the deficiencies when raised by Conagra, and now fails to “justify” her undue delay with the requisite “substantial and convincing evidence,” the Court has ample “justifying reason” to deny Plaintiff’s requested amendment. *See Foman*, 371 U.S. at 182 (“denial of an opportunity to amend is within the discretion of the District Court” if supported by “any justifying reason”). Here, the justifying reasons support denial of Plaintiff’s motion to amend.

But in the event the Court does allow the amended Complaint, the Court’s order should expressly state that Conagra be afforded the opportunity to make a “written offer of relief” “as soon as practicable” as set forth in Mass. Gen. Laws ch. 93A, § 9(3). While Conagra maintains that the proper remedy is dismissal for the reasons set forth above and in the related briefing in support of summary judgment, in the event the Court grants Plaintiff leave to amend it should only do so with an express finding that Conagra is entitled to make a ch. 93A, § 9(3) tender and that such tender triggers all the benefits and protections that ch. 93A, § 9(3) provides to a tendering party. Such a finding would be necessary because Plaintiff continues to play games with her proposed amended complaint – specifically, although paragraph 62 of the proposed amended complaint now states that “no pre-suit demand is required,” paragraph 63 of the same pleading states “[a]lthough not required, Plaintiff sent Defendant written demand for relief pursuant to Chapter 93A” and “Defendant did not respond to Plaintiff’s demand.” *See* ECF No. 83-1, ¶¶ 62-63. Thus, despite now pleading that no ch. 93A letter was required, Plaintiff’s proposed amended complaint still appears to (1) seek legal advantage from a deficient (and allegedly unnecessary) ch. 93A letter and (2) prejudice Conagra by denying a right to tender in response to the proposed amended complaint. Indeed, while Conagra believes this continued gamesmanship is an additional basis for denying leave to amend and granting Conagra’s summary judgment motion, should this

Court be inclined to permit the amendment, it should only do so in an order expressly protecting Conagra's ch. 93A tender rights and remedies, as intended by the statute.

Respectfully submitted,

/s/ Angela Spivey

ALSTON & BIRD LLP

Angela Spivey (admitted *pro hac vice*)

angela.spivey@alston.com

Andrew Phillips (admitted *pro hac vice*)

Andrew.Phillips@alston.com

1201 West Peachtree Street

Atlanta, GA 30309

Tel.: 404-881-7000

Fax: 404-881-7777

DONNELLY, CONROY & GELHAAR, LLP

Joshua N. Ruby (BBO #679113)

jnr@dcglaw.com

260 Franklin St., Suite 1600

Boston, MA 02110

Tel.: (617) 720-2880

Fax: (617) 720-3554

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 20, 2020.

Joshua N. Ruby _____

Joshua N. Ruby