

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

**MAURICE CHABUZ, EDWARD SMITH,)
MARIE-FRANCE SMITH, MADELINE)
MARSH, and WHITECAP INVESTMENT)
CORP. d/b/a PARADISE LUMBER)**

Plaintiffs,

vs.

**PUTNAM LUMBER & EXPORT)
COMPANY, PUTNAM FAMILY)
PROPERTIES, INC., GREAT SOUTHERN)
WOOD PRESERVING, INCORPORATED,)
MIKE NOBLE, XYZ CORPORATION,)
JOHN DOE, & JANE DOE)**

Defendant.

**CASE NO. ST-13-CV-596
f/k/a CASE NO. ST-13-CNT-2**

**ACTION FOR BREACH OF
CONTRACT, BREACH OF
WARRANTY, NEGLIGENCE,
STRICT LIABILITY,
INDEMNITY,
CONTRIBUTION,
FRAUDULENT INDUCEMENT/
MISREPRESENTATION, and
DECLARATORY JUDGMENT**

JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER is before the Court on three Motions to Dismiss Count VIII of Plaintiffs' Complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) and Plaintiffs' Motion to Amend Complaint pursuant to Fed. R. of Civ. P. 15(a)(2). Both motions were opposes and the motions are fully briefed.

The motions to dismiss, though practically identical, were filed separately by Defendants Putnam Lumber & Export Company, Putnam Family Properties, Inc., and Mike Noble.

Plaintiffs Maurice Chabuz, Edward Smith, Marie-France Smith, Madeline Marsh, and Whitecap Investment Corp. d/b/a Paradise Lumber ("Existing Plaintiffs")

collectively filed the Motion to Amend Complaint, Defendants Putnam Lumber & Export Company, Putnam Family Properties, Inc., and Mike Noble oppose the motion to amend and the motion is fully briefed.¹

BACKGROUND

Great Southern Wood Preserving, Inc. (“GSWP”) is an Alabama lumber wholesaler that also provides chemical and pressure treatments to prevent lumber from decaying.

During all times relevant hereto, GSWP regularly sold treated lumber and provided lumber-treatment services to the defendant/cross-claimant Defendants Putnam Lumber and Putnam Properties. Putnam Lumber, a Florida corporation, is itself a lumber retailer. Putnam Lumber regularly sold lumber to, among others, the Plaintiff Whitecap Investment Corporation, doing business as Paradise Lumber (“Paradise Lumber”), which is a lumber retailer operating in St. John, United States Virgin Islands. The Current Individual Plaintiffs allege they bought lumbar from Paradise Lumber and incorporated the GSWP-treated lumber into their homes on St. John, Virgin Islands. They claim that the lumber prematurely decayed and consequently caused damage to their homes. Plaintiffs initiated this matter on November 8, 2013.

¹ . Defendant Great Southern Wood Preserving, Inc. joined in Defendants’ Opposition to Plaintiffs’ Motion to Amend Complaint.

ANALYSIS

Plaintiffs move to amend their complaint to add additional plaintiffs and to clarify Count VIII of their Complaint, and Defendants move to Dismiss Count VIII of Plaintiffs' Complaint. The Court will now address these motions separately.

I. PLAINTIFFS MOTION TO AMEND

Plaintiffs move to amend their complaint in two distinct aspects. First, Plaintiffs move to join additional plaintiffs in the action. Second, Plaintiffs move to alter the verbiage of Count VIII.

A. Joinder of additional Plaintiffs

Plaintiffs move to join Charles Roddy, Edward Piper, Gregory Kinslow, Francisco Posada, Nancy Polucci, William Leete, Katherine Hilliard, and Lorne Battiste as additional plaintiffs ("Additional Plaintiffs"). Defendants oppose joinder of Additional Plaintiffs on grounds that "neither Plaintiffs' Complaint nor Plaintiffs' First Amended Complaint contains allegations that are sufficient to allow for permissive joinder."² Defendants also allege that joinder of Edward Piper is improper because Mr. Piper is already engaged in an identical lawsuit in the United States District Court for the Virgin Islands.

² Def.s' Resp. in Opp'n to Pl.s' Mot. to Amend Compl. ¶ 4.

Persons may join together as plaintiffs in one action when their asserted right to relief arises out of the same transaction, series of transactions, or occurrence and a common question of law or fact will arise in the action.³ A “logical relationship” must exist between the transactions or events that are common to the existing and potential plaintiffs.⁴ Permissive joinder under Rule 20(a) is construed liberally to allow courts to balance judicial economy and prejudice to the defendant.⁵

The Plaintiffs allege that all of the Additional Plaintiffs have homes in St. John and that they purchased insufficiently treated lumber from Whitecap Investment Corp. d/b/a Paradise Lumber (“Whitecap”) which they incorporated into the structures of their homes. Plaintiffs further allege that the aforesaid lumber was insufficiently treated and sold by Defendants to Whitecap. Accordingly, Plaintiffs allege that their right to relief arises from a logically related string of transactions between Plaintiffs and Defendants.

Plaintiffs allege that the Additional Plaintiffs’ claims involve both common questions of law and of fact. The Additional Plaintiffs allegedly suffered injuries which are similar to those of the current Plaintiffs. These alleged injuries include premature rotting of structures constructed from the lumber, diminished home valuations due to premature rot, inability to use or rent their homes, and claims for

³ Fed. R. Civ. P. 20(a)(1) (applicable via Super. Ct. R. 7); *see also Abednego v. St. Croix Alumina, LLC*, 2015 V.I. LEXIS 95, *66 (V.I. Super. Ct. Aug. 10, 2015).

⁴ *Poleon v. GMC*, 42 V.I. 393, 394 (D.V.I. 2000).

⁵ *Id.*

Whitecap to replace the subject wood. Furthermore, all current Plaintiffs and Additional Plaintiffs assert identical causes of action premised on Defendants' alleged distribution of defective lumber. Although the actual structures which incorporate the lumber in question will clearly differ, the existence of allegedly defective or inferiorly treated lumber provided by Defendants forms the central issue of this case for all Plaintiffs. Thus, the Additional Plaintiffs share both common questions of law and fact with current Plaintiffs.⁶

The Court must balance the benefits of judicial efficiency with the possible prejudice to the defendants when deciding whether to join Additional Plaintiffs.⁷ Defendants have not argued that joinder of Additional Plaintiffs will cause prejudice to any of the defendants.⁸ Because the majority of the factual and legal issues relevant to this case are shared by the Existing and Additional Plaintiffs, the Court is not persuaded that the additional evidence will be overwhelming for a jury or that Defendants will be unduly prejudiced by joinder of Additional Plaintiffs.

But, Defendants allege that Edward Piper, one of the Additional Plaintiffs, is engaged as a plaintiff in a different case based on the same factual circumstances and with many of the same parties. Plaintiffs corroborated this allegation in their Reply

⁶ See *Poleon*, 42 V.I. at 395 (requiring only a single basis for commonality of either law or fact in order for proper permissive joinder).

⁷ *Id.*

⁸ Defendants do argue that joinder of Edward Piper is improper but do not specifically argue that prejudice will result from any of Plaintiffs proposed amendments.

to Defendants' Opposition.⁹ Accordingly, the Court will grant Plaintiffs' Motion to Amend with respect to the addition of Plaintiffs Charles Roddy, Gregory Kinslow, Francisco Posada, Nancy Polucci, William Leete, Katherine Hilliard, and Lorne Battiste; but, the Court will deny Plaintiffs' Motion to Amend with respect to the addition of proposed Plaintiff Edward Piper because of his engagement in another parallel lawsuit.

B. Amendments to Count VIII

The Plaintiffs' remaining amendments consist of paragraph renumbering and changes in the wording in and associated with Count VIII. Plaintiffs' Amended Complaint effectively adds allegations that Defendants violated the "Virgin Islands Consumer Protection Law of 1973."¹⁰ Defendants did not oppose these amendments in their Opposition to Plaintiffs' Motion to Amend Complaint.

Rule 8 of the Superior Court Rules provides in pertinent part, "The court may amend any process or pleading for any omission or defect therein, or for any variance between the complaint and the evidence adduced at the trial."¹¹ Rule 8, not Rule 15 of the Federal Rules of Civil Procedure, governs amendments to complaints, "even if Superior Court Rule 8 provides a less comprehensive framework than Federal Rule

⁹ See Pls.' Rep. to Def.s' Resp. in Opp'n to Pl.s' Mot. to Amend Compl., at 6.

¹⁰ Plaintiffs Amended Complaint adds this language to paragraphs 131 and the prayer for relief section. In addition, paragraph 135 now references the "law of the Virgin Islands" instead of the "Act."

¹¹ SUPER. CT. R. 8.

of Civil Procedure 15.”¹² Thus, Fed. R. Civ. P. Rule 15 does not constrain the Court in its application of Rule 8 but may assist the Court in its reasoning.

Because Defendants have not challenged Plaintiffs’ amendments to Count VIII, the Court will grant Plaintiffs’ Motion to Amend with respect to the additional verbiage associated with Count VIII.

II. DEFENDANTS’ MOTIONS TO DISMISS COUNT VIII OF PLAINTIFFS’ COMPLAINT

Defendants move to dismiss Count VIII of Plaintiffs’ Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that the lumber at issue does not fall into any of the categories defined by the 12A V.I.C. § 102(c). But, the Court will deny Defendants’ motions to dismiss as moot because the Court already granted Plaintiffs’ Motion to Amend—which effectively adds another code section to Count VIII under which the Plaintiffs assert liability on the part of Defendants.¹³

Even if the Court chose to entertain Defendants’ motions to dismiss, it would have quickly denied them. Plaintiffs’ original Complaint—which is the subject of

¹² *Santiago v. V.I. Housing Auth.*, 57 V.I. 256, 275, 2012 V.I. Supreme LEXIS 57, *32, 2012 WL 3191360 (V.I. 2012).

¹³ See *Melchior v. Univ. of the V.I.*, 2016 V.I. LEXIS 56, *9 (V.I. Super. Ct. Apr. 27, 2016) (holding Defendant’s 12(b)(6) motion moot because Plaintiff’s subsequent amended complaint rendered the potential decision on the 12(b)(6) motion pointless). The Court finds it necessary to point out that each defendant filed its answer contemporaneously with its 12(b)(6) motions. A 12(b)(6) motion filed contemporaneously with an answer is treated as a 12(c) motion for judgment on the pleadings. See *Williams v. V.I. Gov’t Hosps. & Health Facilities Corp.*, 2016 V.I. LEXIS 30, *4 (V.I. Super. Ct. Apr. 1, 2016). As a result, had the Court not granted the Motion to Amend, the motions to dismiss would have been evaluated as 12(c) motions. Though Defendants’ contention that 12A V.I.C. § 102(c) does not cover the lumber at issue in this case because lumber cannot be a “food, service, credit or debt” is dubious at best, the Court notes that Defendants are still free to file their Motions but urges defendants to file such motions via proper procedural vehicles.

Defendants' motions—alleges that Defendants violated the Virgin Islands Consumer Fraud and Deceptive Business Practices Act (the "CFDBPA"), which is codified at 12A V.I.C. §§ 301-336. Contrary to Defendants' contention, the subject chapter does not define the term "consumer goods." Furthermore, the subject chapter defines "consumer" as "any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household."¹⁴ As a result, the Court would have held that Defendants' arguments are inapplicable to Count VIII of the original Complaint.

CONCLUSION

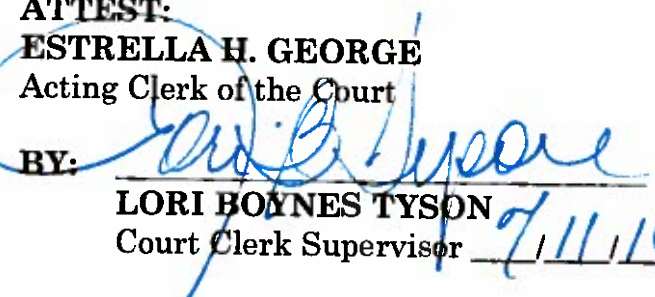
The Court will grant Plaintiffs' Motion to Amend except for the addition of proposed plaintiff Edward Piper. The Court will deny the Defendants' motions to dismiss as moot.

An Order consistent with this Memorandum Opinion will be entered.

DATED: July 11, 2016

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY:


LORI BOYNES TYSON
Court Clerk Supervisor 7/11/16


Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

¹⁴ 12A V.I.C. §303(d).