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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SAFETECH INTERNATIONAL, INC., a Kansas Corporation,	)	
Plaintiff,	)	
vs.	)	**Case No. 02-2216-JAR**
AIR PRODUCTS AND CONTROLS, INC., a Michigan Corporation,	)	
Defendant.	)	

ORDER GRANTING MOTION TO DISMISS AND GRANTING LEAVE TO AMEND

This comes before the Court on Plaintiff's and Counterclaim Defendant's Motion to Dismiss (Doc. 36), and Defendant's Response (Doc. 42) which includes a request to amend its counterclaims. Plaintiff Safetech International, Inc., moves for dismissal of Counts VIII and IX of Defendant's First Amended Answer and Counterclaims, for failure to state fraud with particularity.

Count VIII of Defendant's counterclaim alleges a cause of action for fraud by Plaintiff Safetech. Count VIII alleges that Safetech pledged its accounts receivable to Defendant Air Products to induce Air Products to continue to ship goods to Safetech and Safetech's customers, despite Safetech's knowledge that the same accounts receivable had been previously pledged to Bank of Blue Valley. Count VIII states that:

Air Products relied upon the fraudulent representations by Safetech that Air

> Products was being assigned Safetech's accounts receivable and contractual right to receive payment from these customers. As a direct, proximate and foreseeable result of the fraudulent conduct of Safetech, Air Products has suffered damages in the amount of $201,934.98. . .

Count IX of Defendant's counterclaim contains the same language as Count VIII, but alleges that the fraudulent representations are by Gaylen Davenport, Safetech's President.

Fed. R. Civ. P. 9(b) provides, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally." Allegations of fraud must "set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof."[1] The purpose of Rule 9(b) is "to afford defendant fair notice of plaintiff's claims and the factual ground upon which [they] are based..."[2]

The Court previously granted Defendant leave to amend to add a cause of action for fraud against an additional party, Gaylen Davenport. In granting that motion, the Court rejected Safetech's argument that amendment would be futile because the proposed fraud claim fails to state a claim upon which relief can be granted.[3] Safetech continues to allege that Defendant has failed to comply with Rule 9(b). Safetech acknowledges that Defendant Air Products has probably stated a "who" in its allegations, but argues that it has not stated a "what," "where" or "when" as required by law. Counts VIII and IX fail to mention the place or time at which any misrepresentations were made, and fail to specify the content of the alleged misrepresentations.

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[1] *Koch v. Koch Industries, Inc.,* 203 F.3d 1202, 1236 (10th Cir. 2000) (citing *Lawrence Nat'l Bank v. Edmonds (In re Edmonds),* 924 F.2d 176, 180 (10th Cir. 1991)).

[2] *Id.* at 1236-37 (citation omitted).

[3] *Memorandum and Order*, filed Dec. 5, 2002 (Doc. 31).

Although the Court finds that Defendant's fraud claims are inadequate, Defendant could plead facts that might cure this deficiency in its counterclaims.[4] Therefore, the Court exercises the discretion provided it by Fed. R. Civ. P. 15(a) and grants Defendant leave to amend its counterclaims to comply with the pleading requirements of Rule 9(b).

Defendant Air Products has also filed a motion to compel and for sanctions (Doc. 60 and Doc. 61) that is set for hearing before the Honorable David J. Waxse on June 25, 2003, at 2:30 p.m. This Court will defer to Judge Waxse to set a deadline for Defendant to amend its counterclaim.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiff's and Counterclaim Defendant's Motion to Dismiss (Doc. 36) shall be GRANTED to the extent that Counts VIII and IX of Defendant's counterclaim shall be dismissed without prejudice.

IT IS FURTHER ORDERED THAT Defendant's request for leave to amend (Doc. 42) is GRANTED.

IT IS SO ORDERED.

Dated this 13th day of June, 2003.

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

[4] *See Kindergartners Count, Inc. v. Demoulin*, 171 F. Supp.2d 1183, 1194-95 (D. Kan. 2001).