

10-573-cv
L-7 v. Old Navy

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2010

6
7
8 (Argued: February 7, 2011 Decided: June 1, 2011)

9
10 Docket No. 10-573-cv

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13
14 L-7 DESIGNS, INC.,

15
16 Plaintiff-Appellant,

17
18 - v. -

10-573-cv

19
20 OLD NAVY, LLC,

21
22 Defendant-Appellee.

23
24 - - - - -X

25
26 Before: DENNIS JACOBS, Chief Judge,
27 PETER W. HALL, Circuit Judge,
28 SHIRA A. SCHEINDLIN, * District Judge.
29
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31 Plaintiff-Appellant L-7 Designs appeals from a judgment
32 on the pleadings of the United States District Court for the
33 Southern District of New York (Denny Chin, *Judge*), entered

* The Honorable Shira A. Scheindlin, of the United States District Court for the Southern District of New York, sitting by designation.

1 on January 21, 2010, dismissing five counts asserted in L-
2 7's Complaint, each arising out of a Creative Services
3 Agreement entered into between L-7 Designs and Defendant-
4 Appellee Old Navy in September of 2007. We conclude that
5 the District Court erred in dismissing two of those counts
6 outright because L-7 plausibly alleged three bases for
7 breach of contract for failure to negotiate in good faith
8 (Count III) and wrongful termination (Count I).
9 Accordingly, we affirm in part and vacate in part the
10 District Court's judgment, and we remand for further
11 proceedings; in so doing we reverse in part the order of the
12 District Court that dismissed the Complaint and reinstate
13 the Complaint to the extent provided in this Opinion.

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1 SHIRA A. SCHEINDLIN, District Court Judge:

2
3 Plaintiff-Appellant L-7 Designs ("L-7") appeals from a
4 judgment on the pleadings of the United States District
5 Court for the Southern District of New York (Denny Chin,
6 *Judge*), entered on January 21, 2010, dismissing five counts
7 asserted in L-7's Complaint (the "Complaint" or "Compl."),
8 each arising out of a Creative Services Agreement (the
9 "Agreement") entered into between L-7 and Defendant-Appellee
10 Old Navy ("Old Navy") in September of 2007. We conclude
11 that the District Court erred in dismissing Count III
12 against Old Navy for failure to negotiate in good faith an
13 alleged agreement to develop and launch a TODD OLDHAM
14 branded line of merchandise (the "Branded Line") to be sold
15 exclusively in Old Navy stores. The District Court also
16 erred in dismissing Count I for declaratory judgment that
17 Old Navy wrongfully terminated the parties' Agreement under
18 which L-7's principal, Todd Oldham, was to provide design
19 services to Old Navy. Accordingly, we affirm in part and
20 vacate in part the District Court's judgment, and we remand
21 for further proceedings; in so doing we reverse in part the
22 order of the District Court that dismissed the Complaint and
23 reinstate the Complaint to the extent provided in this
24 Opinion.

1 **BACKGROUND²**

2 **I. Materials Properly Considered on a Motion for Judgment**
3 **on the Pleadings**

4
5 One of the critical issues in this appeal is whether
6 the District Court properly considered not only the
7 Complaint, Old Navy's Answer, and the written documents
8 attached to the Complaint in deciding Old Navy's Rule 12(c)
9 motion, but also five email exhibits to Old Navy's
10 *Counterclaims* - exhibits that were "attached" to Old Navy's
11 Answer only by virtue of the fact that its Answer and
12 Counterclaims were filed in the same document. L-7 argues
13 the District Court improperly considered the exhibits
14 without converting Old Navy's 12(c) motion to one for
15 summary judgment, as required by Rule 12(d).

16 On a 12(c) motion, the court considers "the complaint,
17 the answer, any written documents attached to them, and any
18 matter of which the court can take judicial notice for the
19 factual background of the case." Roberts v. Babkiewicz, 582
20 F.3d 418, 419 (2d Cir. 2009). "A complaint is [also] deemed
21 to include any written instrument attached to it as an
22 exhibit, materials incorporated in it by reference, and

² We set forth the pleadings in great detail to demonstrate the unusual amount of material the District Court had before it on this 12(c) motion.

documents that, although not incorporated by reference, are 'integral' to the complaint." Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004) (citations omitted) (quoting Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002)). There is no question that the email exhibits were "attached" to Old Navy's Answer, even if they were only "part of" Old Navy's Counterclaims. See Fed. R. Civ. P. 10(c) ("a copy of a written instrument that is an exhibit to a pleading is a *part of* the pleading for all purposes") (emphasis added). Moreover, these emails - of which L-7 had notice well before Old Navy attached them to its Answer (because L-7 sent or received them) - were "integral" to the negotiation exchange that L-7 identified as the basis for its Complaint. See Sira, 380 F.3d at 67 (document not expressly cited in complaint was "incorporated into the pleading because [it] was integral to [plaintiff's] ability to pursue" his cause of action); Chambers, 282 F.3d at 153 (document "integral" to complaint where complaint "relie[d] heavily upon its terms and effect") (quotation marks omitted); Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991) (necessity of translating motion into one under Rule 56 "largely dissipated" where plaintiff had "actual notice" of information in documents and "relied upon [them] in framing

1 the complaint"). "Plaintiffs' failure to include matters of
2 which as pleaders they had notice and which were integral to
3 their claim - and that they apparently most wanted to avoid
4 - may not serve as a means of forestalling the district
5 court's decision on [a 12(b)(6)] motion." Cortec, 949 F.2d
6 at 44. For these reasons, in reviewing de novo Old Navy's
7 motion for judgment on the pleadings, we draw all facts -
8 which we assume to be true unless contradicted by more
9 specific allegations or documentary evidence - from the
10 Complaint and from the exhibits attached thereto,³ and we
11 also consider the emails attached to Old Navy's
12 Counterclaims. See Blue Tree Hotels Inv. (Canada), Ltd. v.
13 Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 222
14 (2d Cir. 2004) (discrediting allegation "belied" by letters
15 attached to the complaint); Hirsch v. Arthur Andersen & Co.,
16 72 F.3d 1085, 1092 (2d Cir. 1995) ("General, conclusory
17 allegations need not be credited . . . when they are belied
18 by more specific allegations of the complaint."). The facts
19 thus derived, viewed in the light most favorable to L-7, are
20 as follows.

³ All exhibits cited herein are exhibits to the Complaint unless otherwise noted.

II. The Parties

L-7's principal, Todd Oldham, is a world famous artist, fashion and graphic designer, photographer, writer, and television personality. He formed L-7 in 1989 to manage his design services and intellectual property rights, including eight U.S. federal registrations for the mark TODD OLDHAM. "[A] luminary in the fashion and design industry for over twenty years," Oldham is "considered one of the most important designers of fashion and home furnishings working today" and "the singular talent behind the internationally famous TODD OLDHAM brand." Compl. ¶ 8. For more than a decade, Oldham and L-7 have collaborated on a variety of TODD OLDHAM branded merchandise.⁴

Old Navy, a subsidiary of Gap Inc., operates a chain of retail apparel stores, with more than a thousand stores throughout the United States and Canada. For at least the last five years, Old Navy has been suffering declining sales. One of its strategies for increasing sales has been to increase its appeal to younger consumers.

⁴ For example, Oldham entered into a licensing agreement with Mattel, Inc. for a special collector's edition of a Barbie doll.

III. The Agreement

In the spring of 2007, L-7 approached Old Navy to discuss the possibility of entering into a relationship with L-7, and Old Navy, "enthusiastic about this possibility," ultimately requested that Oldham become the company's new Design Creative Director. Id. ¶ 26. In order to induce Oldham to join Old Navy's design team, Old Navy proposed to introduce a TODD OLDHAM branded line of clothing, and to pay royalties to L-7 in the form of five percent of the Branded Line's sales. Faced with continuing declining sales, Old Navy pushed Oldham to enter into an agreement quickly so that it could publicly announce both Oldham's appointment as Old Navy's Design Creative Director and also the launching of the Branded Line.

On September 21, 2007, the parties entered into the Agreement,⁵ under which L-7 was to perform certain "Services" and provide certain "Deliverables," as set forth in a "Scope of Work" (the "SOW") attached to the Agreement. Agreement § 1. Under the SOW, Oldham would provide design services for Old Navy for three years in exchange for an annual "fee" of \$2 million; in addition, Oldham would

⁵ By its terms, the Agreement is governed by New York law.

1 receive a guaranteed bonus of \$0.5 million in year one and,
2 in years two and three, 1.25 percent of the year's
3 incremental sales (not to exceed \$6 million). SOW §§ 1, 2.
4 Section 5 provided that during the term of the Agreement,
5 "either party may terminate this Agreement, effective
6 immediately upon notice thereof, in the event of a material
7 breach of this Agreement that remains uncured after thirty
8 (30) days written notice of the breach to the other party."

9 **IV. The Licensing Agreement**

10 Section 5 of the SOW, entitled "Todd Oldham Branded
11 Line," provided as follows:

12 a. In September 2007, the parties will announce
13 publicly that Todd Oldham/[L-7] shall be
14 serving as Design Creative Director of Old Navy
15 and that it is the intent of the parties to
16 develop and launch a line of products that will
17 bear TODD OLDHAM Marks to be sold exclusively
18 at Old Navy stores at a future time.

19
20 b. [L-7] and Old Navy acknowledge and agree
21 that the specific terms and conditions related
22 to this proposed line of products bearing TODD
23 OLDHAM Marks are to be negotiated and agreed
24 upon by the parties in a separate agreement.
25 The parties plan to enter into a separate
26 agreement related to these products by October
27 1, 2008.

28
29 c. The parties agree that this separate
30 agreement will contain at least the following:
31 (1) royalty fees paid to [L-7] of 5% of Old
32 Navy's retail sales for this particular line
33 only (not all Old Navy products) and (2)
34 agreement and final approval by both Old Navy

1 and [L-7] as to the collections and products to
2 be sold by Old Navy.
3

4 On September 21, 2007, Old Navy announced via a press
5 release that it intended to launch the Branded Line. On
6 October 3, 2007, Monika Fahlbusch (the Old Navy executive
7 assigned to the Branded Line) emailed Vital Vayness (L-7's
8 representative) to "recommend we plan to begin [discussion
9 on the license agreement for the Branded Line] in our new
10 fiscal year - say in April? We have until October so there
11 is no rush" Ex. 19. Thereafter, L-7 and Oldham
12 performed their obligations under the Agreement, and Old
13 Navy executives publicly and privately praised Oldham's
14 performance as Design Creative Director.

15 **V. April-October 2008 Negotiations**

16 On April 2, 2008, L-7 (Vayness) "initiated negotiations
17 to finalize" the licensing agreement for the Branded Line by
18 emailing Fahlbusch (Old Navy) L-7's standard form license
19 agreement and a term sheet that outlined a three-year
20 initial term and annual guaranteed minimum royalties (the
21 "April Proposal"). Compl. ¶ 44. The email suggested that
22 Old Navy "formulate [its] initial thoughts, needs and
23 objectives" and then "present to [Oldham] in [M]ay" while

1 Fahlbusch (Old Navy), Vayness (L-7), and Old Navy's attorney
2 "begin work on the language of the contract." Ex. 17.

3 Commencing in May 2008, Old Navy made "material
4 representations" that were "false, as [L-7] subsequently
5 learned." Compl. ¶ 47; accord Ex. 19. For example in May
6 of 2008, Fahlbusch (Old Navy) assured Vayness (L-7) that she
7 was "already working with our legal team on the licensing
8 agreement template." Ex. 19. But throughout the late
9 spring and summer of 2008, L-7 repeatedly followed up with
10 Fahlbusch and Old Navy's Executive Vice President, Douglas
11 Howe, seeking feedback on the April Proposal and on a
12 "redirection" Old Navy was taking in its "approach," with
13 little or no followup. Exs. 19-20. During one meeting in
14 June of 2008 at which Oldham (L-7), Howe (Old Navy), and Tom
15 Wyatt (another Old Navy executive) were present, Old Navy
16 proposed postponing discussions of the Branded Line.
17 Nevertheless, on June 12, 2008, Vayness (L-7) indicated to
18 Fahlbusch (Old Navy) that "things are proceeding in the
19 right direction with the branded line." Ex. 19.

20 In a late July 2008 email, Fahlbusch (Old Navy)
21 suggested that the reason for Old Navy's delay in getting
22 back to L-7 was that "next steps" on the Branded Line
23 license would be "impacted by who is named President." Id.

1 Vayness (L-7) responded the same day, reminding Fahlbusch
2 (Old Navy) that "we have a provision in the contract calling
3 for the license agreement to be entered into by October
4 1st." Id.

5 On September 2, 2008, Vayness (L-7) emailed Fahlbusch
6 (Old Navy) seeking Old Navy's feedback on the terms set
7 forth in L-7's April 2008 email, indicating that L-7 was
8 "ready to discuss [11 points] as early as possible." Ex.
9 20. L-7 followed up with emails and telephone calls to
10 Fahlbusch (Old Navy) on September 7, 9, and 10, 2008. On
11 September 10, 2008, Fahlbusch (Old Navy) recommended that
12 Oldham start working "directly" with Howe "as it seems we
13 all have a different understanding of the numerous
14 conversations in recent months related to the branded line."
15 Id.

16 On September 30, 2008, Wyatt (Old Navy) advised L-7 in
17 a telephone call for the first time that Old Navy wished to
18 postpone the signing of a license for the Branded Line
19 "'indefinitely.'" Compl. ¶ 52 (quoting Wyatt).⁶ In

⁶ The Complaint alleges that Howe, Old Navy's then-executive vice president, expressed this to L-7. See Compl. ¶ 52. An October 7, 2008 email from Vayness (L-7) to Wyatt, however, indicates that Wyatt made the statement. See Ex. 23.

1 response, L-7 stated that it expected Old Navy to provide it
2 with definitive dates to restart negotiations, enter into
3 the licensing agreement, and launch the Branded Line, and
4 compensation for the postponement of the initial October 1,
5 2008 signing date. Old Navy failed to provide a response
6 within a week as promised.

7 **VI. Fall 2008 Notice of Breach and Demand for Damages**

8 On October 7, 2008, L-7 advised Old Navy's in-house
9 counsel that Old Navy was in material breach of the
10 Agreement for failing to negotiate in good faith. See Ex.
11 23. Counsel for Old Navy responded a week later, stating
12 Old Navy's view that the Agreement "does not obligate Old
13 Navy to enter into a separate license agreement for Todd
14 Oldham branded products" and that although Old Navy did not
15 "foreclose the possibility of engaging in discussions about
16 Todd Oldham branded products in the future if business
17 conditions permit, [Old Navy is] not currently in a position
18 to make a commitment to any such future discussions." Ex.
19 24. The next day, Wyatt, then President of Old Navy, told
20 Oldham that Old Navy was "'very, very sorry' but because of
21 economic conditions, Old Navy could not follow through with
22 the promised license for a TODD OLDHAM branded line of

1 apparel to be carried exclusively in Old Navy stores."

2 Compl. ¶ 55.

3 After waiting thirty days from Old Navy's receipt of L-
4 7's October 7th notice of breach, outside counsel for L-7
5 sent a letter to Old Navy requesting that Old Navy remedy
6 the damage to L-7 caused by Old Navy's breach by (1)
7 compensating L-7 for lost royalties and reputational damages
8 (estimated at \$75 million) and (2) paying Oldham his
9 expected fees for the second and third years of the
10 Agreement (\$4 million).

11 **VII. Old Navy's December 2008 Response**

12 On December 3, 2008, counsel for Old Navy responded,
13 denying that Old Navy was obligated to enter into a license
14 agreement or had failed to negotiate in good faith. Counsel
15 for Old Navy explained that, in the course of their
16 negotiations,

17 differences emerged in the parties' positions,
18 including on such essential issues as the types
19 of products to be included in the line, how
20 many stores would be included in a launch, the
21 staffing necessary to support such a line, and,
22 most importantly, the timing of any such
23 launch.

24
25 Ex. 26. According to Old Navy's counsel, "business
26 circumstances made an extensive launch in the immediate near
27 term unfeasible." Id. Thereafter, from December 15, 2008

1 to February 6, 2009, Old Navy engaged in "sham
2 negotiations," falsely representing that it fully intended
3 to enter into a license agreement. Compl. ¶ 124.

4 **VIII. The Old Navy January 2009 Proposal**

5 The parties met once in December 2008 and several times
6 in January 2009 to "work out the details of the license
7 agreement," a further draft of which L-7 supplied to Old
8 Navy on December 15, 2008. Compl. ¶ 60. On January 8,
9 2009, one hour before a scheduled conference call, Old Navy
10 proposed a launch at 100 Old Navy stores ("As you know, our
11 history of presenting third party-branded product in our
12 stores is relatively short . . ."); a one-year commitment
13 beginning in the spring of 2010; no additional personnel
14 resources; and a one-year projected royalty of \$1.5 million
15 (" . . . our previous discussions have never contemplated any
16 royalty minimum guarantees, and, as a general rule, our
17 company has not and will not agree to minimum guarantees.
18 This has been consistent in all of our recent agreements.")
19 (the "January Proposal"). Ex. 27.

20 **IX. January 2009 Discussions⁷**

⁷ L-7's Complaint and exhibits attached thereto largely omit reference to the parties' January 2009 discussions. The "facts" set forth below are primarily drawn from the five email exhibits to Old Navy's

1 Oldham responded immediately by email to Old Navy's
2 January Proposal:

3 [Your projections] seem EXTREMELY uncommitted
4 to me. This feels like an effort to absolve
5 old navy's contractual responsibilities and not
6 a commitment to build a new brand that was made
7 to me when i joined and what you reiterated to
8 me last month. 100 stores will not work. the
9 1 million in launch dollars will not be
10 effective. the one year commitment is too
11 brief as there are so many hiccups in launching
12 a brand i hope that we can get this
13 resolved but we are very far away from a
14 reasonable plan. the volume of work necessary
15 to bring a project of this scale to bloom is at
16 great odds with your financial projections.
17

18 Counterclaims Ex. A. In the discussions that followed, L-7
19 asked for a minimum guarantee of \$37.5 million for a
20 three-year term and then reduced the request to \$20 million
21 for a two-year term. On January 16, 2009, L-7 inquired of
22 Old Navy whether it had "made any changes to any of its
23 positions as stated [in the January Proposal]." Id. Ex. E.
24 Old Navy responded the next day:

25 To date, we have not been presented with any
26 comprehensive counteroffer and instead there
27 has been a [sic] insistence on large guaranteed
28 minimum payments that we have explained are
29 unacceptable and inconsistent with our business
30 plans and practices
31

Counterclaims.

1 Id. Ex. D. Additional emails were exchanged, and on January
2 29, 2009, the parties held a conference call, during which
3 they agreed to talk again after speaking with their
4 respective "principals." Ex. 28. The same day, L-7 emailed
5 Old Navy a "revised proposal" reflecting Oldham's input on
6 the points discussed during the call. Id.

7 **X. February 2009 Communications**

8 Four days later, on February 2, 2009, Old Navy
9 responded to L-7's January 29th email, advising L-7 that
10 "despite our best efforts to negotiate an agreement that
11 would be reasonable and mutually acceptable, we have not
12 reached and will not be able to reach common ground on key
13 business terms," reiterating that minimum guaranteed
14 payments were "inconsistent with our business plans and
15 practices." Id. Vayness (L-7) responded the same day,
16 explaining his "surprise" at Old Navy's email given that the
17 January 29, 2009 call was "completely amicable, polite,
18 professional, and [] friendly" and that none of the points
19 discussed during that call "was left off as a deal breaker."
20 Id. The email went on to list items as to which L-7
21 contended there was agreement ("number of stores,"
22 "products," "timeline and term," "marketing," "royalty
23 rate," and "territory"); items that it was "now prepared" to

1 accept, including no minimum guaranteed royalties; two
2 points that needed clarification ("personnel" and
3 "development budget"); and one issue "to be agreed to,"
4 namely ownership of "designs."⁸ Id. On February 6, 2009,
5 Old Navy advised L-7 that material "open issues" remained,
6 and that, in light of the nature of the negotiations, Old
7 Navy did not believe that a "collaborative partnership"
8 could be established. Compl. ¶ 62.

9 **XI. Old Navy's Termination of the Agreement**

10 On February 18, 2009, L-7 commenced this lawsuit
11 against Old Navy, filing under seal a complaint alleging
12 breach of contract, breach of the implied duty of good faith
13 and fair dealing, and fraud. Two days later, on February
14 20, 2009, counsel for Old Navy sent L-7 a letter terminating
15 the Agreement ("Termination Letter") on the grounds that L-7
16 had

17 materially breached the [Agreement] by filing a
18 lawsuit against Old Navy, by failing to provide
19 meaningful input on design processes and
20 procedures, by failing to participate
21 meaningfully in meetings with the Old Navy

⁸ Citing this email, L-7 alleges in the Complaint that "[o]n February 2, 2009, L-7 . . . accepted Old Navy's January 8, 2009 proposal in its entirety." Compl. ¶ 61. As the text of the email makes clear, however, this was not quite so.

1 creative team and by otherwise failing to
2 perform its obligations under the [Agreement].
3

4 Ex. 29. Old Navy did not provide L-7 with an opportunity to
5 cure its alleged breaches. Prior to the February 20th
6 Termination Letter, Old Navy had voiced no complaints about
7 Oldham's performance under the Agreement; instead, he was
8 continuously praised.
9

10 PROCEDURAL HISTORY

11 L-7 filed its first complaint in the District Court on
12 February 18, 2009, under seal. On April 17, 2009, L-7 filed
13 under seal the amended Complaint at issue in this appeal,
14 adding claims for (I) wrongful termination and (II) trade
15 disparagement to its claims for (III) breach of contract,
16 (IV) breach of the implied covenant of good faith and fair
17 dealing, and (V) fraud. Old Navy filed its Answer and
18 Counterclaims on May 1, 2009, and L-7 filed a Reply on May
19 8, 2009. Old Navy's motion for judgment on the pleadings
20 was fully submitted on August 21, 2009. On September 9,
21 2009, the District Court stayed depositions and ruled that
22 "a new discovery cut-off will be set after the pending [Rule
23 12(c)] motion is decided." Special Appendix to L-7
24 Appellate Brief ("L-7 App. Brief") at 66. In an opinion

1 dated January 19, 2010, it granted Old Navy's motion,
2 dismissing L-7's Complaint with prejudice. It issued a
3 slightly amended opinion on January 21, 2010. L-7 moved to
4 amend the judgment and replead two weeks later. The
5 District Court denied L-7's motion in an opinion dated
6 February 16, 2010.

7 **I. Motion for Judgment on the Pleadings**

8 **A. Count III: Breach of Contract for Failure to Negotiate**
9 **in Good Faith**

10
11 The District Court first dismissed L-7's claim for
12 breach of contract for Old Navy's failure to enter into the
13 licensing agreement.⁹ It nonetheless concluded that Section
14 5 of the SOW "undoubtedly did create [an] obligation on the
15 part of the parties to negotiate a license agreement in good
16 faith," L-7 Designs, Inc. v. Old Navy, LLC, No. 09 Civ.
17 1432, 2010 WL 157494, at *8 (S.D.N.Y. Jan. 19, 2010).
18 However, it found that the "record" of the "detailed
19 documentation of the negotiations between Old Navy and L-7
20 over the anticipated license agreement," combined with the
21 detailed allegations of the Complaint, "show, unequivocally,
22 that L-7's claim that Old Navy failed to negotiate in good

⁹ We affirm this portion of the District Court's dismissal of Count III.

1 faith is not plausible." Id. First, based on the fact that
2 "the parties exchanged numerous telephone calls and emails
3 and, as L-7 acknowledged, progress in the negotiations was
4 made," it concluded that Old Navy "negotiated for some ten
5 months." Id. Although "the parties seemed to reach an
6 impasse and negotiations broke down" in the fall of 2008,
7 "the parties resumed talks and met several times in December
8 2008 and January 2009" before L-7 rejected Old Navy's
9 January Proposal. Id.

10 Second, the District Court concluded that because "L-7
11 was making extraordinarily high demands," it was "not
12 surprising that Old Navy resisted these demands," noting
13 that at the agreed-upon five percent royalty rate "some \$200
14 million in sales of Todd Oldham branded products would had
15 to have been generated in one year to generate" even the
16 reduced royalty request proposed by L-7 (\$20 million over
17 two years). Id.

18 Third, L-7's only non-conclusory, specific "allegation"
19 was "its assertion that Old Navy decided to 'renege' on its
20 own January 8, 2009, proposal, and that this decision 'is
21 itself damning evidence of [Old Navy's] bad faith.'" Id. at
22 *9 (quoting L-7's Memorandum of Law in Opposition to Old
23 Navy's Motion for Judgment on the Pleadings ("L-7 12(c)

Opp.") at 23). But, the District Court concluded, the emails attached to Old Navy's Counterclaims rendered this assertion "not plausible" because they showed that "L-7's purported acceptance of the January 8th proposal on February 2, 2009, clearly was not [] an acceptance of the proposal 'in its entirety.'" Id. (quoting Compl. ¶ 61).

Fourth, because "insisting on 'terms to the point of impasse' [is] not sufficient to show bad faith," L-7 could not argue that "Old Navy's refusal to agree to a minimum guarantee [was] evidence of bad faith." Id. (citing Venture Assocs. Corp. v. Zenith Data Sys. Corp., 96 F.3d 275, 279 (7th Cir. 1996)).¹⁰

B. Count I: Wrongful Termination

The District Court also dismissed Count I – a request for declaratory judgment (1) that Old Navy failed to provide (i) written notice of its claims of breach or (ii) 30 days' opportunity to cure any claimed breach; (2) that the Termination Letter did not effect a termination of the

¹⁰ The District Court then concluded that, because Count IV (breach of the implied duty of good faith and fair dealing) was "essentially identical" to Count III "as both are based on the allegation that Old Navy failed to negotiate a license agreement in good faith," Count IV failed to state a claim "[f]or the [same] reasons." 2010 WL 157494, at *9.

1 Agreement; and (3) that Old Navy wrongfully terminated the
2 Agreement in retaliation for L-7's lawsuit against it. The
3 District Court offered three reasons why "the claim fails as
4 a matter of law," 2010 WL 157494, at *9. *First*, "Old Navy
5 did provide written notice of termination." Id. at *10
6 (citing the Termination Letter). *Second*, while
7 acknowledging Old Navy's admission that it failed to provide
8 a 30-day cure period, the District Court found that it was
9 relieved of this obligation because, for two reasons, notice
10 of cure would have been futile. Initially, the District
11 Court reasoned, "[i]t is difficult to imagine that Oldham
12 could perform [his] duties after he sued Old Navy." Id.
13 (citing Allbrand Discount Liquors, Inc. v. Times Square
14 Stores Corp., 399 N.Y.S.2d 700, 701 (2d Dep't 1977), for the
15 proposition that "when one party 'will not live up to the
16 contract, the aggrieved party is relieved from the
17 performance of futile acts'"). In particular,

18 Oldham could not very well continue to help Old
19 Navy creatively, including with respect to
20 public relations matters, while pursuing a
21 lawsuit against Old Navy. ([Agreement] § 1).
22 Among other things, Oldham was supposed to,
23 under the [Agreement], "[m]otivate, inspire,
24 coach, and share vision, insight and passion
25 with Old Navy's creative team," and he was
26 supposed to "[p]rovide input" to Old Navy's
27 president and leadership team. (Id.).
28

1 Id. Notice of breach would also have been futile, the
2 District Court reasoned, because “[e]ven a withdrawal of the
3 complaint – and it is highly unlikely that L-7 would have
4 withdrawn the complaint if Old Navy had sent L-7 a notice to
5 cure – would not have undone the harm caused by the public
6 filing of a lawsuit against Old Navy.” Id. *Third*, Count I
7 failed because “even assuming the failure to give a cure
8 period was a breach, in the context here it surely was not a
9 material one.” Id.

10 After then dismissing Counts II and V of the Complaint
11 for trade disparagement and fraud, the District Court
12 granted Old Navy’s motion for judgment on the pleadings and
13 dismissed L-7’s claims with prejudice. Judgment was entered
14 in favor of Old Navy on January 21, 2010.

15 **II. Motion to Amend and Replead**

16 L-7 filed a motion to amend the judgment and replead on
17 February 5, 2010 “based on information contained in
18 documents produced by Old Navy following the close of
19 briefing” on the Rule 12(c) motion. L-7 Motion to Amend and
20 Replead at 1. The District Court denied the motion,
21 reasoning that L-7 had already had “two bites at the apple,
22 as it has already filed two complaints”; “the request is
23 untimely, as L-7 has had the documents for months” yet

1 “never indicated a desire to amend its amended complaint
2 prior to the granting of the motion for judgment on the
3 pleadings”; and, because “the additional documents L-7 now
4 seeks to rely on” would not change the District Court’s
5 conclusions, “the proposed amendment therefore would be
6 futile.” L-7 Designs, Inc. v. Old Navy, LLC, No. 09 Civ.
7 1432, 2010 WL 532160, at *2 (S.D.N.Y. Feb. 16, 2010). L-7
8 filed a timely notice of appeal on February 17, 2010.

10 DISCUSSION

11 I. Motion for Judgment on the Pleadings

12 A. Standard of Review

13 We review de novo a district court’s decision to grant
14 a motion for judgment on the pleadings pursuant to Rule
15 12(c). See Hayden v. Paterson, 594 F.3d 150, 160 (2d Cir.
16 2010). In deciding a Rule 12(c) motion, we “employ[] the
17 same . . . standard applicable to dismissals pursuant to
18 [Rule] 12(b)(6). Thus, we will accept all factual
19 allegations in the [C]omplaint as true and draw all
20 reasonable inferences in [Plaintiff’s] favor.” Johnson v.

1 Rowley, 569 F.3d 40, 43 (2d Cir. 2009) (quotation marks and
2 citation omitted).¹¹

3 In Ashcroft v. Iqbal, the Supreme Court set forth a
4 “two-pronged approach” to evaluate the sufficiency of a
5 complaint. 129 S. Ct. at 1949-50. “First, although a court
6 must accept as true all of the allegations contained in a
7 complaint, that tenet is inapplicable to legal conclusions,
8 and threadbare recitals of the elements of a cause of
9 action, supported by mere conclusory statements, do not
10 suffice.” Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009)
11 (quotation marks and alterations omitted). “Second, only a
12 complaint that states a plausible claim for relief survives
13 a motion to dismiss, and determining whether a complaint
14 states a plausible claim for relief will . . . be a

¹¹ We note that, as plaintiffs carefully heed the admonition to support “legal conclusions” with factual allegations – lest they be deemed “conclusory” and therefore denied a presumption of truthfulness, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) – trial judges, and appellate judges who review their determinations, are constantly faced with the task of evaluating competing inferences to be drawn from those facts. In this sense, Iqbal and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 586 (2007), have rendered even more important (and more difficult) both trial judges’ adherence to the most fundamental pleading principles – namely, accepting as true all factual allegations and drawing all reasonable inferences from those facts in plaintiffs’ favor – and appellate judges’ subsequent de novo review of the decisions of the district courts.

1 context-specific task that requires the reviewing court to
2 draw on its judicial experience and common sense." Id.
3 (quotation marks and alteration omitted). "The plausibility
4 standard is not akin to a probability requirement, but it
5 asks for more than a sheer possibility that a defendant has
6 acted unlawfully." Iqbal, 129 S. Ct. at 1949 (quotation
7 marks omitted). Plausibility thus depends on a host of
8 considerations: the full factual picture presented by the
9 complaint, the particular cause of action and its elements,
10 and the existence of alternative explanations so obvious
11 that they render plaintiff's inferences unreasonable. See
12 id. at 1947-52.

13 **B. Counts II, IV, and V**

14 We affirm the District Court's dismissal of the trade
15 disparagement and common law fraud claims substantially for
16 the reasons articulated by the District Court. We also
17 affirm dismissal of the claim for breach of the implied duty
18 of good faith and fair dealing, but for a different reason.
19 See infra note 18.

20 **C. Count III: Breach of Contract for Failure to Negotiate** 21 **in Good Faith**

22 **1. Applicable Law** 23 24

1 Under New York law parties who enter into binding
2 preliminary agreements, such as Section 5 of the SOW,
3 "accept a mutual commitment to negotiate together in good
4 faith in an effort to reach final agreement"
5 Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co., 670 F.
6 Supp. 491, 498 (S.D.N.Y. 1987). These agreements do not
7 commit the parties to reach their ultimate contractual
8 objective; instead, such agreements create an "obligation to
9 negotiate the open issues in good faith in an attempt to
10 reach the . . . objective within the agreed framework."
11 Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc., 145 F.3d
12 543, 548 (2d Cir. 1998) (quotation marks omitted). This
13 obligation bars a party from "renouncing the deal,
14 abandoning the negotiations, or insisting on conditions that
15 do not conform to the preliminary agreement." Tribune, 670
16 F. Supp. at 498.

17 "In effect, an agreement to agree buys a party an
18 assurance that the transaction will falter only over a
19 genuine disagreement, thus allowing a party strapped for
20 time or money to go ahead with arrangements with a
21 sufficient degree of confidence in the outcome." P.A.
22 Bergner & Co. v. Martinez, 823 F. Supp. 151, 156 (S.D.N.Y.
23 1993); see also Penguin Grp. (USA) Inc. v. Steinbeck, No. 06

1 CV 2438, 2009 WL 857466, at *2 (S.D.N.Y. Mar. 31, 2009)
2 (“The linchpin of negotiation is not that one side
3 capitulates to the other, but that there is a good faith,
4 honest, articulation of interests, positions, or
5 understandings.”); Venture Assocs. Corp., 96 F.3d at 278
6 (“The parties may want assurance that their investments in
7 time and money and effort will not be wiped out by the other
8 party’s foot-dragging or change of heart or taking advantage
9 of a vulnerable position created in the negotiation.”).
10 “[T]he parties may abandon the transaction as long as they
11 have made a good faith effort to close the deal and have not
12 insisted on conditions that do not conform to the
13 preliminary writing.” Adjustrite, 145 F.3d at 548.

14 To state a claim for breach of contract for failure to
15 negotiate in good faith, a plaintiff must “allege the
16 specific instances or acts that amounted to the breach”;
17 “generalized allegations and grievances” will not suffice to
18 survive a motion for judgment on the pleadings. U.S. ex
19 rel. Smith v. New York Presbyterian Hosp., No. 06 Civ. 4056,
20 2007 WL 2142312, at *16 (S.D.N.Y. July 18, 2007); accord
21 Prospect St. Ventures I, LLC v. Eclipsys Solutions Corp.,
22 804 N.Y.S.2d 301, 302 (1st Dep’t 2005).

1 Although lost profits are not available where no
2 agreement is reached, see Goodstein Constr. Corp. v. City of
3 New York, 80 N.Y.2d 366, 374 (1992), out-of-pocket costs
4 incurred in the course of good faith partial performance are
5 appropriate, see Arcadian Phosphates, Inc. v. Arcadian
6 Corp., 884 F.2d 69, 74 n.2 (2d Cir. 1989).

7 **2. Application**

8 L-7 stated a plausible claim that Old Navy breached its
9 obligation to negotiate the license agreement in good faith.
10 The three bases alleged for this claim were that Old Navy
11 (1) "failed to participate in negotiations from April 2008
12 to December 15, 2008 and never provided a single substantive
13 comment with respect to the draft license at any time in
14 2008," L-7 12(c) Opp. at 5;¹² (2) made "repeated material
15 representations that it would negotiate the terms of the
16 license agreement in good faith," which L-7 subsequently
17 learned were "false," Compl. ¶ 47; and (3) "proposed terms
18 it knew to be in bad faith and economically unfair to [L-7],
19 believing they would be rejected, and then reneged when [L-
20 7] did accept," L-7 12(c) Opp. at 23. These are legally

¹² See also L-7 12(c) Opp. at 23 (Old Navy "fail[ed] to engage [L-7] in negotiations on the licence with [L-7] for more than one year.").

1 cognizable theories for breach of the duty to negotiate in
2 good faith. Moreover, drawing all reasonable inferences in
3 L-7's favor, the non-conclusory allegations in L-7's
4 Complaint, combined with the exhibits attached thereto,
5 render each one plausible.¹³

6 *First*, L-7 plausibly alleged that Old Navy – who in
7 June of 2008 proposed postponing negotiations – was engaged
8 in dilatory tactics from April 2008 until December 15, 2008,
9 during which time it failed to provide any substantive
10 comments on L-7's draft license agreement. The emails
11 exchanged between Vayness (L-7) and Fahlbusch (Old Navy)
12 from April 2008 until September 10, 2008 – when Fahlbusch
13 finally “recommend[ed]” that Vayness and Oldham work
14 “directly with [Howe] in terms of the branded line,” Ex. 21
15 – support the plausible inference that Fahlbusch was
16 repeatedly putting L-7 off for undisclosed or pretextual

¹³ Citing Adjustrite, 145 F.3d at 548, Defendant argues that the District Court could find, as a matter of law based on Old Navy's proposal of terms “consistent with” Section 5 of the SOW, that it negotiated in good faith. However, the only term specified in the September 2007 agreement with which Old Navy's proposal could have “conform[ed]” was the five percent royalty fee. That the January Proposal included this royalty provision does not establish as a legal matter that it acted in good faith, especially in light of L-7's well-pled allegations that the January negotiations were designed to induce L-7's rejection.

1 reasons (discussed further below). The mere exchange of
2 telephone calls and emails - most of which were initiated by
3 L-7 (according to L-7's exhibits) and some of which Old Navy
4 did not respond to (according to L-7's uncontradicted
5 allegations) - does not make the inference that "Old Navy
6 negotiated for some ten months," 2010 WL 157494, at *8, so
7 obvious that L-7's opposing inference of dilatory tactics is
8 rendered implausible.¹⁴

9 Similarly, whether or not L-7 agreed to Old Navy's
10 alleged request to postpone discussions in June of 2008 - a
11 question of fact left open by the pleadings¹⁵ - that would

¹⁴ Nor is the inference that "progress in the negotiations was made," 2010 WL 157494, at *8, so obvious from L-7's June 12th email that "things are proceeding in the right direction with the branded line" that L-7's reasonable, opposing inference must be discredited. Drawing all reasonable inferences in L-7's favor, and taking into account its allegations that Old Navy was stalling, the June 12th email suggests that L-7, frustrated with Old Navy's non-responsiveness, was politely encouraging Old Navy to entertain L-7's proposals, while communicating its view that the parties still had a long way to go.

¹⁵ In the "Facts" section of its opinion, the District Court stated that "Old Navy wanted to postpone the launch [of the Branded Line] and L-7 was prepared to do so, from October 1, 2008, to February 1, 2009." 2010 WL 157494, at *2. However, in making this factual determination, it cited a *draft* email from Vayness (L-7) to Howe (Old Navy) on Oldham's behalf. See Ex. 22 (entitled "2nd draft e mail to [Howe]"). The email Vayness (L-7) actually sent states only his "underst[anding]" that Howe "*thought* that [Oldham] had agreed to postpone the finalizing of an agreement." Id.

1 not defeat L-7's allegations that Old Navy was engaged in
2 dilatory tactics. "[A]ssuming the pleaded facts to be true
3 and read[ing those facts] in [L-7's] favor,"
4 Sepúlveda-Villarini v. Dep't of Educ. of Puerto Rico, 628
5 F.3d 25, 30 (1st Cir. 2010) (Souter, J.), it suggests the
6 converse – that L-7, eager to execute the licensing
7 agreement on terms as favorable to it as possible, and
8 trusting that its negotiating partner in good faith believed
9 a postponement of discussions would be mutually
10 advantageous, was negotiating in good faith. It is
11 reasonable to infer that, once L-7 became suspicious of what
12 it believed to be dilatory tactics on Old Navy's part, it
13 took a firmer stance, clarifying that while Old Navy may
14 have "thought that [Oldham] agreed to postpone the
15 finalizing of an agreement," the "idea of postponing
16 immediate discussions" was merely "discussed," and that the
17 parties should work to ensure that the Agreement did not
18 "become breached," Ex. 22.

(emphasis added). The draft email written by Oldham's representative about a June meeting for which he (the representative) was not present and where "the idea of postponing the discussion . . . was discussed" does not establish, at the motion for judgment on the pleadings stage, that "L-7 was prepared" to postpone the launch of the Branded Line by four months, 2010 WL 157494, at *2.

1 *Second*, L-7 plausibly alleged that, commencing in May
2 2008, Old Navy made repeated material representations that
3 L-7 subsequently learned were false, such as Fahlbusch's
4 (Old Navy's) assurances to Oldham that she was already
5 working with Old Navy's legal team on the licensing
6 agreement template, or her multiple promises to get back to
7 L-7, which either never happened or only occurred after
8 substantial delay.¹⁶ L-7's Complaint also suggests that,
9 instead of revealing "its true purpose, *which was to avoid*
10 *entering into the license agreement* as required under the
11 [Agreement]," Compl. ¶ 121 (emphasis added), Old Navy
12 advanced pretextual reasons for its decision to delay
13 negotiations (economic conditions) and, ultimately, to cut
14 off negotiations (L-7's insistence on minimum guaranteed
15 royalties). See Teachers Ins. & Annuity Assoc. of Am. v.
16 Butler, 626 F. Supp. 1229, 1233-34 (S.D.N.Y. 1986)
17 (upholding a finding of bad faith, after a six-day non-jury
18 trial, where evidence suggested that defendant "deliberately
19 intended" not to close on an agreement that was no longer

¹⁶ A *reasonable inference* to draw from Old Navy's lack of communication and failure to supply counter-proposals or comments – on a draft license agreement that Old Navy's legal team was supposedly "already working" on as early as May 2008 – is that Fahlbusch's (Old Navy's) representation was false.

1 "economically favorable" to it due to a decline in interest
2 rates, "seiz[ing] on" other terms of the agreement "as a
3 pretext for not going forward with" it at the eleventh
4 hour). That Old Navy's "true purpose" was to avoid
5 negotiating *at all* can be inferred from the fact that Old
6 Navy informed L-7 (1) that it wished to postpone the signing
7 of a license indefinitely, (2) that it could not make a
8 commitment to *any* discussions, and, ultimately, (3) that it
9 "could not follow through with the promised license," Compl.
10 ¶ 55.

11 Moreover, L-7's Complaint and the exhibits attached
12 thereto support the inference that Old Navy's purported
13 reasons for withdrawing from negotiations - i.e., that
14 minimum guaranteed royalties were "inconsistent with [Old
15 Navy's] business plans and practices," Ex. 28 - were
16 pretextual. As of December 3, 2008, minimum guaranteed
17 royalties were not one of the four "essential issues" on
18 which "differences [had] emerged in the parties' positions"
19 according to Old Navy, Ex. 26 (describing "the timing of
20 [the] launch" as the "most important[]" issue); and assuming
21 the truth of L-7's uncontradicted documentary evidence, none
22 of the points that had "yet to be resolved" after the
23 January 29th conference call - including minimum guaranteed

1 royalties - "was left off as a deal breaker" to L-7, Ex. 28.

2 *Third*, L-7 plausibly alleged that Old Navy's January
3 Proposal was designed to be "economically unfair" to L-7 so
4 that L-7 would reject it, pointing to Old Navy's "reneging"
5 on its offer when L-7 ultimately signaled - after several
6 counteroffers - that it would accept the bulk of the January
7 Proposal. See L-7 12(c) Opp. at 23. While the District
8 Court concluded as a matter of law that L-7 did not "accept"
9 Old Navy's January Proposal, we are inclined to see a fact
10 question as to whether L-7 plausibly alleged that Old Navy's
11 January Proposal was designed to elicit L-7's rejection.
12 See Venture Assocs., 96 F.3d at 280 (business owner would be
13 acting in bad faith if its purpose in demanding more than
14 prospective buyer would pay "was to induce [prospective
15 buyer] to back out of the deal"). Whether or not L-7
16 "rejected key terms of Old Navy's" January Proposal or "made
17 a series of counter-demands" before attempting to resurrect
18 it, 2010 WL 157494, at *9,¹⁷ the well-pled fact remains

¹⁷ The District Court concluded that L-7's requests for minimum guaranteed royalties constituted "extraordinarily high demands" to which Old Navy's resistance was "not surprising," 2010 WL 157494, at *8. But L-7 argues, and we are inclined to agree, that this factual determination was made without the benefit of discovery or expert testimony.

1 that, when L-7 finally acquiesced to Old Navy's insistence
2 on no minimum guaranteed royalties and appeared willing to
3 accept an offer substantially on Old Navy's terms, Old Navy
4 balked. In light of the (1) documentary evidence that Old
5 Navy's first proposal for the Branded Line did not come
6 until January of 2009, after the intervention of outside
7 counsel; (2) allegations that Old Navy's sluggish
8 negotiations from December 15, 2008 to February 6, 2009 were
9 a "sham," Compl. ¶ 124; (3) documentary evidence that L-7
10 was slowly retreating from and ultimately abandoned its
11 insistence on minimum guaranteed royalties, a supposed
12 sticking point for Old Navy; and (4) allegations that, under
13 new management and in a deteriorating retail environment,
14 Old Navy had decided it did not want to close *any* deal with
15 Oldham, the Complaint raised the plausible inference that
16 Old Navy's January Proposal was designed to elicit L-7's
17 rejection. For all of these reasons, L-7 stated a claim for
18 breach of contract for failure to negotiate in good faith.¹⁸

¹⁸ Because L-7's claim for breach of the implied covenant of good faith and fair dealing (Count IV) is based on the same facts as its claim for breach of contract, it should have been dismissed as redundant. See Harris v. Provident Life & Accident Ins. Co., 310 F.3d 73, 81 (2d Cir. 2002); Fasolino Foods Co. v. Banca Nazionale del Lavoro, 961 F.2d 1052, 1056 (2d Cir. 1992) ("[B]reach of [the duty of good faith and fair dealing] is merely a breach of the

D. Count I: Wrongful Termination

L-7 stated a claim for declaratory judgment for all three prongs of Count I. *First*, L-7 stated a claim for declaratory judgment that Old Navy failed to comply with the notice and cure provisions of the Agreement. Before either party could terminate the Agreement, section 5 required (1) notice of a material breach, (2) 30 days' opportunity to cure, (3) failure to cure the material breach, and (4) notice of termination. See Agreement § 5. But Old Navy's Termination Letter provided only notice of termination - effective immediately - without providing L-7 with notice of its alleged breaches and 30 days' opportunity to cure. Old Navy conceded as much in its motion for judgment on the pleadings. See Old Navy's Memorandum of Law in Support of Motion for Judgment on the Pleadings at 23. Therefore, this claim should have survived.

Second, for the same reasons, L-7's claim for declaratory judgment that the Termination letter did not effect a termination of the Agreement should have survived.

Third, L-7 stated a claim for declaratory judgment that Old Navy wrongfully terminated the Agreement. Old Navy

underlying contract.").

1 notified L-7 that it had "materially breached the
2 [Agreement] by [(1)] filing a lawsuit against Old Navy" and
3 (2) by failing to satisfy certain unspecified performance
4 obligations. Ex. 29. "[B]ringing suit to determine the
5 meaning of an agreement is not a breach of that agreement
6 absent some explicit contractual provision that the party
7 will not bring suit." Prudential Equity Grp., LLC v.
8 Ajamie, 538 F. Supp. 2d 605, 611-12 (S.D.N.Y. 2008).
9 Moreover, as L-7 explained to the District Court, "none of
10 the vague, unspecified issues mentioned in the Termination
11 Letter had been previously raised with L-7. . . . To the
12 contrary, Mr. Oldham had been repeatedly and widely praised
13 by Gap and Old Navy executives and staff throughout his Old
14 Navy tenure." L-7 App. Brief at 50 (citing multiple
15 allegations in, and documentary evidence supporting, the
16 Complaint). Old Navy made no argument, and pointed to no
17 evidence, contradicting these well-pled facts. Therefore,
18 accepting L-7's allegations as true and drawing every
19 inference in its favor, L-7 plausibly alleged that it was in
20 compliance with the Agreement, which was therefore
21 wrongfully terminated.

22 The District Court dismissed Count I upon its
23 determination that Old Navy had no duty to provide L-7 with

1 an opportunity to cure because such cure would have been
2 futile. (Of course, if the alleged grounds for L-7's
3 termination did not constitute breach or material breach,
4 then it is irrelevant whether L-7 could have "cured.")
5 Thus, the District Court concluded that Oldham was unlikely
6 to have been able to "perform [his] duties after he sued Old
7 Navy" and unlikely to have withdrawn his complaint if Old
8 Navy had sent a notice of breach. But this appears to be
9 speculative. That conclusion, and the conclusion that
10 withdrawal of the complaint could not have "undone the harm
11 caused by the *public* filing of a lawsuit against Old Navy,"
12 2010 WL 157494, at *10 (emphasis added), rests on the public
13 nature of the litigation. However, it is undisputed that
14 both of L-7's complaints were filed under seal. For all of
15 these reasons, Count I survives Old Navy's 12(c) motion as a
16 matter of law.

17 **II. Motion to Amend the Judgment and Replead**

18 We generally review motions for reconsideration under
19 an "abuse of discretion" standard. See Devlin v. Transp.
20 Comm'n Int'l Union, 175 F.3d 121, 131-32 (2d Cir. 1999).
21 However, a denial of leave to amend that is based on a legal
22 interpretation, such as for futility, is reviewed de novo.
23 See Gorman v. Consol. Edison Corp., 488 F.3d 586, 592 (2d

1 Cir. 2007); Littlejohn v. Artuz, 271 F.3d 360, 362 (2d Cir.
2 2001).

3 The District Court erred in denying L-7's motion for
4 leave to replead its bad faith negotiation claim based on
5 futility.¹⁹ However, in light of our finding that Count III
6 stated a claim for relief, this error was harmless because
7 that Count of L-7's April 17, 2009 Complaint is reinstated.

8 **CONCLUSION**

9 For the foregoing reasons, we affirm in part and vacate
10 in part the District Court's judgment, and we remand for
11 further proceedings; in so doing we reverse in part the
12 order of the District Court that dismissed the Complaint and
13 reinstate Count I and Count III (on the three bases
14 discussed in this Opinion).

¹⁹ We affirm the District Court's denial of L-7's motion for leave to replead trade disparagement and fraud.