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ATTORNEYS FOR PLAINTIFFS

**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF NEW JERSEY**

CHARLES MAJOR; MAJOR TOURS, INC.; VICTORIA DANIELS; M & M TOURS LLC; JAMES WRIGHT; JW AUTO, INC. d/b/a OCEAN TOURS; GLEN RAGIN, SR. d/b/a JAMM TOURS; ROBERT ALLEN; CARL REVELS d/b/a CMT EXPRESS,	No. 05-CV-03091
Plaintiffs,	Judge Jerome B. Simandle
v.	Magistrate Judge Joel Schneider
NEW JERSEY DEPARTMENT OF TRANSPORTATION; NEW JERSEY MOTOR VEHICLE COMMISSION; KRIS KOLLURI, individually and as Commissioner of the New Jersey Department of Transportation; JOHN F. LETTIERE, individually and as Commissioner of the New Jersey Department of Transportation; SHARON HARRINGTON, individually and as Chief Administrator of the New Jersey Motor Vehicle Commission; DIANE LEGREIDE, individually and as Chief Administrator of the New Jersey Motor Vehicle Commission; VINCENT SCHULZE, individually and as Chief of the Commercial Bus Inspection and Investigation Unit for the New Jersey Department of Transportation; MICHAEL CALOREL, individually and as Principal Investigator for the New Jersey Department of Transportation; JIMMY'S LAKESIDE GARAGE; JAMES RESTUCCIO, individually and proprietor of Jimmy's Lakeside Garage,	PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR CROSS MOTION TO FILE A THIRD AMENDED COMPLAINT AND JURY DEMAND
Defendants.	

INTRODUCTION

Plaintiffs Charles Major; Major Tours, Inc., Victoria Daniels, M & M Tours LLC, James Wright, JW Auto, Inc., Glen Ragin, Sr., Robert Allen, and Carl Revels (collectively “Plaintiffs”) files this cross motion seeking leave of court to file a Third Amended Complaint as attached hereto in this matter. Plaintiffs seek to amend their complaint as follows:

- Add claims under Title VI of the Civil Rights of 1964, 42 U.S.C. § 2000d.
- Add claims under the New Jersey Law Against Discrimination, N.J.S.A. § 10:5-4
- Clarify allegations raised in Plaintiffs’ Second Amended Complaint and to assert additional factual allegations based on facts uncovered during discovery.
- Clarify and specify which claims are being asserted against which defendants.

The proposed amended complaint, which is attached to this motion, is based on the same underlying conduct complained of in the prior complaint and will not require additional discovery or otherwise burden Defendants in this case. Its principal purpose is to add two additional statutory causes of action based on the conduct previously alleged. Based on discovery, including a second round of depositions taken between August and December 2009, it is now clear that Defendants have violated Title VI and the LAD. Because the Complaint is being amended for that purpose, Plaintiffs have also clarified the limited nature of certain claims in the Second Amended Complaint and clarified a few limited factual allegations in it. Defendants will not be prejudiced by the amendments; the amendments will not necessitate time being added to the discovery schedule as all of the facts necessary to assert or defend against the claims have been conducted; and, justice requires that leave to amend should be granted.

PROCEDURAL POSTURE AND BACKGROUND

Plaintiffs filed their initial complaint on June 15, 2005. That complaint contained several misperceptions that were quite understandable. For example, although the Commercial Bus Inspection Unit (“CBIU”) was transferred from the New Jersey Department of Transportation (“NJDOT”) in either July or October 2003 – almost two years before Plaintiffs filed their complaint – the CBIU inspectors continued to wear NJDOT uniforms and badges. As CBIU Chief Defendant Schulze testified, the change was physically indiscernible.

Legally, the change was significant. Consequently, when Plaintiffs filed their second amended complaint on August 11, 2008, it was principally to add the Motor Vehicle Commission (“MVC”) as a party and class claims. Magistrate Judge Schneider allowed the amendment in part, denying Plaintiffs’ motion as to the addition of class claims. Plaintiffs’ claims in their second amended complaint did not undergo significant changes.

Discovery in this case has been contentious at times and prolonged. Judge Schneider divided the fact discovery into separate phases – paper discovery, electronic data and depositions. Judge Schneider and the parties agreed that it was important to obtain the documents prior to taking oral testimony. Nonetheless, the production of paper and electronic data were the source of many hearings and motion practice. Fact depositions were conducted in two rounds – pre-email production and post-email production – with the last order scheduling fact depositions to be completed by December 22, 2009.

ARGUMENT

I. PLAINTIFFS' AMENDED COMPLAINT COMPLIES WITH RULE 15.

Federal Rule of Civil Procedure 15 provides that: “The court should freely give leave [to amend] when justice so requires.” The Court of Appeals for the Third Circuit has held that under Rule 15 courts should use “strong liberality” in considering whether to grant leave to amend. *Dole v. Arco Hem. Co.*, 921 F.2 484, 487 (3d Cir. 1990); *Bechtel v. Robinson*, 886 F.2d 644 (3d Cir. 1989). “This approach ensures that a particular claim will be decided on the merits rather than on technicalities.” *Id.* (quoting Wright, Miller, Kane, *Federal Practice and Procedure*, Vol. 6 § 1471 at 505 (2d ed. 1990)). See *Shane v. Fauver*, 213 F.3d 113, 115-17 (3d Cir. 2000) (Keeping in mind that the purpose of Rule 15 is to have a case decided on the merits rather than on a technicality, leave to amend a pleading should be freely granted.). *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 886-87 (3d Cir. 1992).

A. Plaintiffs' Third Amended Complaint Pass the Test.

Plaintiffs Motion to file the Third Amended Complaint is being made in Good Faith, therefore it satisfies the factors held by the Supreme Court and the Third Circuit as dispositive in determining whether to grant the motion to amend. Factors that the court considers in ruling on the motion are undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by previously allowed amendments, undue prejudice to the opposing party, and futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1982). None of these are present in this case.

1. No party is unduly prejudiced by the Amendment.

The issue of prejudice requires that the court focus on the hardship to the non-moving

parties in determining whether to permit the amendment. *Adams v. Gould Inc.*, 739 F.2d 858, 868 (3d Cir. 1984) *cert. den.*, 469 U.S. 1122 (1985). A party is unduly prejudiced if amendment would cause surprise, result in additional discovery, or add cost in the preparation to defend against new facts or theories. *Cureton v. NCAA*, 252 F.3d 267, 273 (3d Cir. 2001)

Critically, as plaintiffs goal is the streamlining of the facts already presented in the Second Amended Complaint to properly reflect the laws that were pled as being violated, none of the changes in the Amendment will prejudice Defendants' ability to defend themselves for they arise out of the same nexus of facts which were at the center of the discovery already conducted. The addition of two new claims or basis for liability arising out of the same factual pattern would not require any additional discovery and does not prejudice Defendants in any manner for being presented at this time rather than in the earlier pleading.

In fact plaintiffs first Amended Complaint which was already the focus of discovery included the LAD claim. However, it was inadvertently eliminated in the Second Amended Complaint. Therefore, that issue, would cause no prejudice to the Defendants and would weigh in favor of the interest of permitting all of Plaintiffs claims to be heard in the interest of justice.

2. The Amendment is not futile.

The other important Issue the Court must determine when deciding a motion to amend is whether the Complaint if amended would be futile because it would fail to state a claim. The Court has ruled that the standard for review of futility is same as legal sufficiency under Fed. R. Civ. Proc. 12(b)(6). Thus, a proposed amended complaint can be deemed futile only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *See Brown v. Phillip Morris, Inc.* 250 F.3d 789, 796 (3rd Cir. 2001).

As set forth in detail in the contemporaneously-filed Memorandum of Law in Opposition to the State Defendants' Motion to Dismiss, the claims in this matter are of great public importance, and discovery has yielded substantial, if not incontrovertible, evidence that the State Defendants have committed serious wrongs. Thus, the proposed Amendment is not futile. *In re Burlington Coat Factory Litigation*, 114 F3d 1410, 1434 (3rd Cir. 1997). (A proposed amended complaint can be deemed futile only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.).

II. LEAVE SHOULD BE GRANTED TO ALLOW PLAINTIFFS TO ADD CLAIMS UNDER TITLE VI OF THE CIVIL RIGHTS ACT, 42 U.S.C. § 2000d.

Title VI of the Civil Rights Act of 1964, provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” 42 U.S.C. § 2000d. Congress has unambiguously abrogated states' Eleventh Amendment immunity from private Title VI suits. The relevant statute reads:

A State shall not be immune under the Eleventh Amendment to the United States Constitution from suit in Federal court for a violation of . . . title VI of the Civil Rights Act of 1964.

42 U.S.C. § 2000d-7 (2006).

Critically, Title VI applies to activities “under any program” receiving Federal financial assistance. When Plaintiffs filed their Complaint in August 2008, it was not clear whether federal grant funds were actually used to conduct the inspections in Atlantic City, or whether those funds were devoted to other CBIU activities not implicated in this case (*e.g.*, so-called “new entrant safety audits”). Therefore, Plaintiffs did not, at that time, plead a claim under Title

VI. It was not until Plaintiffs took State Defendants' Rule 30(b)(6) deposition of Thomas Harcar, the proffered witness who is responsible for MCSAP grant applications in April 2009 that Plaintiffs were able to seek information about the Federal financial assistance that State Defendants received. Unfortunately he was unable to respond at that time.

It was not until the third day of his deposition, on September 11, 2009 that Mr. Harcar was able to establish that, in fact, federal grant funds are used for commercial bus inspections throughout New Jersey. Accordingly, Plaintiffs are now cross-moving for leave to add Title VI claims to their complaint.

III. LEAVE SHOULD BE GRANTED TO ALLOW PLAINTIFFS TO ADD CLAIMS UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION, N.J.S.A. 10:5.

Plaintiffs seek leave to add claims under the LAD as to Jimmy's Lakes, James Restuccio and individual State Defendants: Kolluri, Lettiere, Legriede, Harrington, Schulze and Calorel . These defendants are already on notice that Plaintiffs contend that they have violated rights under the New Jersey state Constitution through claims asserted under the New Jersey Civil Rights Act, NJSA 10:6-2 (c) and (e). The addition of the claims under the New Jersey Law Against Discrimination does not prejudice their ability to defend as the Defendant have been litigating this point form the inception of the Lawsuit and have had ample opportunity based upon the facts as enunciated in the Second Amended Complaint, although it clarifies the right to relief Plaintiffs are entitled to *Lowrey v. Texas A.M. Univ. Sys.* 117 F3d 242, 246 n. 2 (1997)

Also, as the proposed amendment would necessitate no new discovery or the engaging of any additional expert, the defendants would incur no added time and expense in defending against the new claims therefore, there would be no prejudice to the defendants. *See Cureton* 252

F.3d at 274 (denying leave to amend where additional claims would necessitate new discovery and preparation); *McKenna v. City of Philadelphia*, 511 F.Supp.2d 518, 528 (E.D. Pa. 2007) (denying leave to amend where new issues would likely require additional discovery and additional expert testimony);.

IV. LEAVE SHOULD BE GRANTED TO ALLOW PLAINTIFFS TO CLARIFY ALLEGATIONS RAISED IN PLAINTIFFS' PREVIOUS COMPLAINTS

The Parties have taken dozens of depositions – many for multiple sessions – and have reviewed tens of thousands of paper documents and thousands of electronic files during the discovery phase of this litigation. The bulk of this discovery was produced after Plaintiffs filed their Second Amended Complaint. Additionally, Plaintiffs have conducted extensive research into the operation of the Motor Carrier Assistance Program (“MCSAP”) to supplement the information gained from Plaintiffs’ own experiences and their pre-filing research. Although some of the specific allegations about how the Defendants conduct their business may be subject to revision in order to tell the full story, the core of the Complaint concerning discriminatory treatment experienced by Plaintiffs remains correct. Plaintiffs are revising the allegations to the minimum extent necessary consistent with its duty to the Court to accurately state what is known.

V. LEAVE SHOULD BE GRANTED TO ALLOW PLAINTIFFS TO SPECIFY WHICH CLAIMS PERTAIN TO WHICH DEFENDANTS.

State Defendants’ Motion to Dismiss provided Plaintiffs with some insight into certain misperceptions which the wording of their Complaint produced. For example, although Plaintiffs intended their Section 1981 claims to apply to Defendants Jimmy’s Lakeside and Restuccio –and not to State Defendants, the wording was not so limited and the claims were

ambiguous. This was clarified in motion practice, but as trial is looming, amending the complaint to include the right parties and the right cause of action can only serve the intent of Rule 15. *Associated Musicians v. Parker Meridian Hotel*, 145 F. 3d85, 89-90.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' motion for leave to file the accompanying Third Amended Complaint should be granted.

Respectfully submitted,

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