

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA  
AT WHEELING**

**CSX TRANSPORTATION, INC.,**

**Plaintiff,**

v.

**Civil Action No. 5:05-cv-202**

**ROBERT V. GILKISON, et al.,**

**Defendants.**

**CSX TRANSPORTATION, INC.'S MOTION  
FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

Comes Now CSX Transportation, Inc. ("CSXT"), by counsel pursuant to Federal Rule of Civil Procedure 15, and hereby moves this Court for leave to file its proposed Second Amended Complaint, which is attached as Exhibit 1.

**INTRODUCTION**

In its March 28, 2008 Order, this Court held that CSXT's Amended Complaint, which asserted civil RICO, RICO conspiracy and common law fraud and conspiracy claims against Harron and the lawyer Defendants, "did not exceed the bounds of the leave to amend granted by the [Court's] June 20, 2007 order." (Order at 5.) In other words, the Court acknowledged that the amended claims were properly at issue in this case.

CSXT's proposed Second Amendment Complaint is based on the same fraudulent scheme described in the Amended Complaint and reasserts claims based on the same legal theories. (*See* Am. Compl. at ¶¶ 3, 20-21, 70-75, 79, 90, 97, 101; Prop. 2d Am. Compl. at ¶¶ 2-3, 20-21, 129-138, 142, 153, 160, 164.) Specifically, the proposed Second Amended Complaint alleges that Harron and the lawyer Defendants fabricated and prosecuted objectively baseless asbestos claims against CSXT, and seeks damages for injuries caused by eleven such claims.

Of the eleven fraudulent claims for which CSXT seeks damages, eight were part of the *Amos, et al.*, *Abel, et al.* and *Charles Adams, et al.* lawsuits previously described in the Amended Complaint. (See Am. Compl. at ¶¶ 71(f), (h), (j); Prop. 2d A. Compl. at ¶¶ 101, 108, 121, 133(a)-(c).) The remaining three were part of a lawsuit, *Herbert Adams, et al.*, filed five months after, in the same court, and by the same individual as the *Charles Adams* suit. (See Am. Compl. at ¶ 71(j); Prop. 2d Am. Compl. at ¶¶ 121-128, 133(d).) In fact, *Charles Adams* and *Herbert Adams* were dismissed pursuant to the same order and are part of the same consolidated appeal by the lawyer Defendants to the West Virginia Supreme Court of Appeals. (See Prop. 2d Am. Compl. at ¶¶ 124, 128.)

Like the original Amended Complaint, CSXT's proposed Second Amended Complaint does not assert any new causes of action against Gilkison or the Peirce firm. Moreover, as previously indicated, if the Court grants CSXT leave to amend, CSXT is willing to consent to separate trials under Federal Rule of Civil Procedure 42(b) of the claims against Gilkison and the Peirce firm to ensure that they are resolved as expeditiously as possible. (See CSXT's Reply to Peirce Defs.' Resp. to CSXT's Mot. for Recon. of March 28, 2008 Order at 1 n.1.)

#### LEGAL STANDARD

"Under Rule 15(a), after filing a first amended complaint by right, a plaintiff may subsequently amend his complaint only with permission from the court." *Sciolino v. City of Newport News*, 480 F.3d 642, 651 (4th Cir. 2007). However, "Rule 15(a) instructs that leave to amend shall be freely given when justice so requires," which "gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Id.*; see also *Foman v. Davis*, 371 U.S. 178, 182 (1962) (holding that Rule 15's "mandate is to be heeded" and that if the "underlying facts or circumstances relied upon by a plaintiff may be a

proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits”). A motion for leave to amend “should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile.” *Sciolino*, 480 F.3d at 651. Moreover, “a post-judgment motion to amend is evaluated under the same legal standard as a similar motion filed before judgment was entered – for prejudice, bad faith, or futility.” *Id.*

## ARGUMENT

### I. CSXT’S PROPOSED SECOND AMENDED COMPLAINT IS NOT PREJUDICIAL.

As noted above, CSXT’s proposed Second Amended Complaint is based on the same fraudulent scheme described in the Amended Complaint. Although all Defendants recently answered the Amended Complaint, no discovery or other activity has occurred with respect to the common law claims that survived the Court’s March 28th and April 1st statute of limitations rulings, and no trial date has been set. Under these circumstances, Defendants cannot claim any prejudice as a result of CSXT being permitted to re-plead its previously dismissed counts.

Indeed, courts within the Fourth Circuit consistently hold that an amendment is not prejudicial when it is made in advance of trial and relates to issues already before the court, and have granted leave under circumstances very similar to the present case. In *State of North Carolina ex rel. Long v. Alexander & Alexander Servs., Inc.*, 711 F. Supp. 257, 259 (E.D.N.C. 1989), the court initially dismissed portions of the plaintiff’s complaint, including the civil RICO counts, for failure to state a claim. The plaintiff then moved for leave to file an amended complaint reasserting the RICO claims, which the defendants opposed as prejudicial.

[Defendants] argue that they will be prejudiced if leave is granted here because they will have to prepare new defenses and conduct additional discovery. However, this does not suffice as a showing of prejudice: “It is true that prejudice

can result where a proposed amendment raises a new legal theory that would require the gathering and analysis of facts not already considered by the opposing party, but that basis for a finding of prejudice essentially applies where the amendment is offered shortly before or during trial.” [quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986).] Since plaintiff’s request to amend was not made shortly before or during trial, the inconvenience that may result to the defendants does not rise to the level of prejudice which would warrant its denial.

Furthermore, the additional claims for relief set forth in the proposed amendment are based on the same facts which, although not alleged with the same degree of particularity, also formed the basis of Count IV of the original complaint, and therefore cannot come as a complete surprise to the defendants. In *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980), the Court held that “because defendant was from the outset made fully aware of the events giving rise to the action, an allowance of the amendment could not in any way prejudice the preparation of defendant’s case.” Although the defendants here may not have been fully aware of the particular facts alleged in the proposed amendment, they were sufficiently aware of the general nature of these facts as alleged in Count IV of the original complaint to prevent this court from finding prejudice.

*Id.* at 260; *see also Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 280 (4th Cir. 1987) (reversing district court’s denial of leave to amend where the “motion did not . . . take the defendant by surprise or require it to investigate a claim of which it was not already cognizant”); *Ambrose v. Southworth Prods. Corp.*, 953 F. Supp. 728, 732 (W.D. Va. 1997) (granting leave to amend in part because “plaintiff’s proposed amended complaint is based on the same factual circumstances that underlie the amended complaint that is currently before this court”).

Here, CSXT is moving for leave just one month after the Court’s rulings on Defendants’ motions to dismiss, and before any discovery has occurred with respect to the surviving claims. As a result, Harron and the lawyer Defendants will have a full and complete opportunity to prepare their defense. *See City of Charleston v. Hotels.com, LP*, 487 F. Supp. 2d 676, 681 (D.S.C. 2007) (finding no prejudice where the proposed amendment was “offered while there is still time for additional discovery, if needed”); *Shinn v. Greeness*, 218 F.R.D. 478, 488 (M.D.N.C. 2003) (granting leave to amend where “the opportunity to conduct any additional

discovery will still be available to [the defendant] in order that he can adequately defend himself against these new allegations”); *W. Va. Hous. Dev. Fund v. Ocwen Tech. Xchange, Inc.*, 200 F.R.D. 564, 568 (S.D. W. Va. 2001) (“If there is prejudice [from the proposed amendment], additional discovery would cure it.”); *Crago v. Capital Advantage Fin. & Dev., Inc.*, 242 F.R.D. 341, 347 (D.S.C. 2007) (“It is true that allowing the amendment will increase the Defendants’ cost in defending this suit because the amendment will add two theories of recovery. However, the court is of the opinion that these additional expenses do not constitute prejudice . . .”).

Additionally, Harron and the lawyer Defendants cannot claim any surprise as a result of CSXT’s proposed amendment, which is based on the exact same fraudulent scheme alleged in the original Amended Complaint. Harron and the lawyer Defendants have been on notice since being brought into this suit that CSXT intended to pursue causes of action against them based on their fabrication and prosecution of objectively baseless claims. Furthermore, CSXT previously advised Defendants and the Court that it intended to seek leave to plead any new examples of fraud it uncovered. (*See* CSXT’s Opp. to Lawyer Defs.’ Mot. to Dismiss Counts I-IV of Am. Compl. at 19; CSXT’s Mot. for Recon. of March 28, 2008 Order at 7 n.4; CSXT’s Mot. for Recon. of April 1, 2008 Order at 7 n.3.)

While it is true that the proposed Second Amendment Complaint contains some new factual allegations, they relate to events with which Defendants are or should be familiar, and merely clarify the narrative background of CSXT’s claims. In fact, it has been held that the “clearest cases for leave to amend are correction of an insufficient claim or defense and clarification of previously alleged claims,” which is precisely what CSXT seeks to do here. *Medoil Corp. v. Clark*, 753 F. Supp. 592, 596 (W.D.N.C. 1990); *see also Connelly v. Gen. Med. Corp.*, 880 F. Supp. 1100, 1110 (E.D. Va. 1995) (granting leave to amend where “the plaintiff

has simply raised new factual contentions” and noting that the “Court can easily stir these new allegations into the analytical brew of this case and still apply the same controlling legal principles”). Thus, because CSXT’s proposed amendment seeks to re-plead issues already before the Court, is made well in advance of trial and with adequate time to conduct additional discovery, it is non-prejudicial as a matter of law and should be permitted.

Defendants may claim that CSXT has delayed in seeking to leave to amend; however, any such argument is without merit. (*See* Peirce Defs.’ Resp. to CSXT’s Mot. to Recon. March 28, 2008 Order at 2 n.2.) In light of the previously pending motions to dismiss, this is the earliest practicable time at which CSXT could move for leave. Further, it is “well-established in this circuit that delay alone, without prejudice, does not support the denial of a motion for leave to amend.” *Pittson Co. v. Buffalo Mining Co.*, 199 F.3d 694, 706 (4th Cir. 1999);<sup>1</sup> *see also* *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006); *Davis*, 615 F.2d at 613; *Ambrose*, 953 F. Supp. at 732 (“In the final analysis, whether plaintiff delayed in filing the instant amended complaint is of no moment.”). “For this reason, a district court may not deny such a motion simply because it has entered judgment against the plaintiff – be it a judgment of dismissal, a summary judgment, or a judgment after trial on the merits.” *Laber*, 438 F.3d at 427. Thus, regardless of whether CSXT allegedly delayed in seeking leave to amend, its proposed amendment is non-prejudicial and should be permitted.

**II. CSXT HAS NOT ACTED IN BAD FAITH BY MOVING FOR LEAVE TO FILE ITS PROPOSED SECOND AMENDED COMPLAINT.**

Defendants also cannot allege or demonstrate any bad faith on the part of CSXT. To the contrary, CSXT is moving for leave before any activity has occurred with respect to the claims

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<sup>1</sup> In *Pittson*, the Fourth Circuit reversed the district court’s denial of leave to amend even after explicitly finding that the plaintiff’s delay in seeking leave was “unwarranted.” 199 F.3d at 706.

against Harron and the lawyer Defendants. CSXT has also indicated its willingness to consent to a separate trial of the claims against Gilkison and the Peirce firm to ensure that they are resolved as expeditiously as possible. Finally, the proposed Second Amended Complaint is pled with extreme specificity, and can hardly be characterized as a frivolous attempt to harass Defendants.

**III. THE CLAIMS CONTAINED IN CSXT'S PROPOSED SECOND AMENDED COMPLAINT ARE NOT FUTILE.**

The Court has already held that the allegations in CSXT's original Amended Complaint stated a claim for fraud and conspiracy and were pled with the requisite particularity. (*See* March 28th Order at 11-12; April 1st Order at 7-8.) The Court also held that CSXT's claims were not barred by the *Noerr-Pennington* doctrine, at least not at this stage of the case. (*See* March 28th Order at 13; April 1st Order at 8-9.) The only basis for the Court's prior dismissal of CSXT's amended claims was its conclusion that eight of the nine injuries on which those claims were based were time-barred. (*See* March 28th Order at 9-10; April 1st Order at 6-7.)

CSXT's proposed Second Amended Complaint alleges four new examples of fraud filed on or later than the date of the Earl Baylor claim that the Court previously found not to be time-barred. (*See* March 28th Order at 9-11; April 1st Order at 6-7; Am. Compl. at ¶ 71(j); Prop. 2d Am. Compl. at ¶¶ 121, 125, 133(c)-(d).) Combined, these five examples of fraud and Defendants' related uses of the mails and wires are sufficient to establish a pattern of racketeering activity as is required for CSXT's RICO claims. *See* 18 U.S.C. § 1961(5); *see also Polin v. Dunn & Bradstreet, Inc.*, 511 F.2d 875 (10th Cir. 1975) (reversing district court's denial of plaintiff's motion for leave to assert non-time barred claim arising from the same facts as previously dismissed claims).

CSXT has also pled six frauds from the *Amos* and *Abel* lawsuits that the Court previously found to be time-barred. (*See* Am. Compl. at 71(f)-(i); Prop. 2d Am. Compl. at ¶¶ 101, 108,

133(a)-(b).) In doing so, CSXT has pled facts that affirmatively preclude, as a matter of law, any conclusion based on the face of the Complaint that CSXT knew or could have known of the injuries caused by these frauds prior to the applicable statutes of limitations cut-offs.<sup>2</sup> (See Prop. 2d Am. Compl. at ¶¶ 105-7, 112-14, 119, 133(b), 135-37, 145(a)); see also *Cashman v. Montefiore Med. Ctr.*, 1993 U.S. Dist. LEXIS 8395 (S.D.N.Y. 1993) (granting plaintiff leave to file amended complaint alleging facts demonstrating that previously dismissed claim was not time-barred); *Nat'l Post Office Mail Handlers Local No. 305 v. U.S. Postal Serv.*, 594 F.2d 988 (4th Cir. 1979) (reversing district court's denial of plaintiff's motion for leave to plead facts precluding dismissal based on lack of standing). Thus, CSXT's proposed Second Amended Complaint alleges eleven specific, non-time barred injuries, as well as numerous related predicate acts of mail and wire fraud, which is more than sufficient to establish a pattern of racketeering activity in support of the RICO claims. Each of the eleven frauds and resulting injuries also support claims for common law fraud and conspiracy. Accordingly, the proposed amendment is not futile and should be permitted.

### CONCLUSION

For the foregoing reasons, CSXT respectfully requests that the Court grant its Motion for Leave to File Second Amended Complaint.

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<sup>2</sup> Even if the Court continues to hold that these injuries are time-barred, pursuant to the separate accrual rule, CSXT has still stated viable RICO causes of action based on the five fraudulent claims filed in 2006. (See CSXT's Reply to Peirce Defs.' Resp. to Mot. for Recon. of March 28, 2008 Order at 2-6.)

**CSX TRANSPORTATION, INC.**

By /s/ Marc E. Williams

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing "*CSX Transportation, Inc.'s Motion for Leave to File Second Amended Complaint*" upon the following via electronic filing with the Court's CM/ECF system on the 2nd day of May, 2008:

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