

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

West Virginia Citizens Defense League, Inc.,

Plaintiff,

Civil Action No.: 3:11-cv-5-JPB

v.

(Bailey, C.J.)

City of Martinsburg, *et al.*, Defendants

Motion for Leave to File Amended Complaint

The Plaintiff, West Virginia Citizens Defense League, Inc., by and through its undersigned counsel, respectfully moves this Honorable Court for entry of an order pursuant to Fed. R. Civ. P. 15(a)(2) granting Plaintiff leave to file an amended complaint and accepting and filing the proposed First Amended Complaint attached herewith.

Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) ***Other Amendments.*** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Fed. R. Civ. P. 15(a)(1)-(2). "The federal policy of liberality in permitting amendments to pleadings, as embodied in [Fed. R. Civ. P. 15], is self-evident." *Davenport v. Ralph N. Peters & Co.*, 386 F.2d 199, 204 (4th Cir. 1967).

[T]he general rule is that leave to amend a complaint under Federal Rule of Civil Procedure 15(a) should be freely given, *see Foman v. Davis*, 371 U.S. 178, 182 (1962), unless “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,” *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (internal quotation marks omitted).”

Steinburg v. Chesterfield County Planning Com’n, 527 F.3d 377, 390 (4th Cir. 2008). “It is this Circuit’s policy to liberally allow amendment in keeping with the spirit of [Fed. R. Civ. P.] 15(a).” *Galustian v. Peter*, 591 F.3d 724, 729 (4th Cir. 2010) (citing *Coral v. Gonse*, 330 F.2d 997, 998 (4th Cir. 1964)). “Motions to amend are typically granted in the absence of an improper motive, such as undue delay, bad faith, or repeated failure to cure a deficiency by amendments previously allowed.” *Harless v. CSX Hotels, Inc.*, 389 F.3d 444, 447 (4th Cir. 2004) (citing *Ward Elec. Serv., Inc. v. First Commercial Bank*, 819 F.2d 496, 497 (4th Cir. 1987)). This presumption is especially strong where the plaintiff “had not yet amended as of right and the defendant had not filed a responsive pleading.” *Galustian*, 591 F.3d at 730 (holding that denial of motion to amend complaint constituted an abuse of discretion).

The proposed amended complaint does not prejudice the Defendants. Here, “Plaintiff[] simply seek[s] to add specificity to [its] allegations in a situation where defendants are aware of the circumstances giving rise to the action.” *Matrix Capital Management Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 195 (4th Cir. 2009) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir.1999) (noting that merely adding specificity to allegations generally does not cause prejudice to the opposing party); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir.1980) (“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.”)) (additional citation omitted). The legal claims presented in the proposed

First Amended Complaint are identical to those presented in the original Complaint and thus do not prejudice the Defendants.¹

This Motion is being made after a period of good faith attempts by Plaintiff's counsel to seek Defendants' consent to the proposed amended complaint—which, had it been granted, would have obviated the need for this motion and the necessity of this Court's ruling thereon. Prior to filing this motion, Plaintiff's counsel contacted Defendants' counsel and attempted in good faith to seek consent to the filing of the proposed amended complaint. On Thursday, August 4, 2011, Plaintiff's counsel sent Defendants' counsel an e-mail containing a copy of the proposed amended complaint (except for the proposed date of filing) and a request that the Defendants consent to its filing. Plaintiff's counsel immediately received an "auto-reply" e-mail indicating Defendants' counsel was out of his office and would return on Monday, August 8, 2011. On Tuesday, August 9, 2011, Plaintiff's counsel sent Defendants' counsel a follow-up e-mail on this matter. In response to the follow-up e-mail, Defendants' counsel requested another copy of the proposed amended complaint, to which Plaintiff's counsel promptly responded. On Friday, August 12, 2011, Plaintiff's counsel sent Defendants' counsel an additional e-mail, succinctly requesting, "Do your clients have any response to the proposed amended complaint?" Defendants' counsel was nonresponsive to this e-mail. Defendants and their counsel have neither consented to the filing of the proposed amended complaint nor given Plaintiff and its counsel the courtesy of a reply indicating their intentions on this matter.

The proposed amendment is hardly futile. The proposed First Amended Complaint merely pleads facts that cure the facial deficiencies in Plaintiff's original complaint identified by

¹ The Defendants' pending motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), [Doc. 12], is awaiting a ruling by this Court, as this Court's prior Order, [Doc. 16] addressed only Defendants' motion to dismiss for lack of subject-matter jurisdiction (standing) under Fed. R. Civ. P. 12(b)(1).

this Court in its *Order Denying Defendants' Pre-Answer Motion to Dismiss*, [Doc. 16] at 9, as presented to this Court by *Pls' Mem. Of Law in Resp. and Opp. to Defs.' First Motion to Dismiss*, [Doc. 14], and the Declaration of Arthur Thomm, II, [Doc. 14-1]. In its order, this Court has already found these additional facts to be sufficient to cure the facial defect in the original Complaint.

In light of the settled Supreme Court and Fourth Circuit precedent liberally applying the dictate of Fed. R. Civ. P. 15(a)(2) that “[t]he court should freely give leave when justice so requires,” Plaintiff respectfully requests that this Honorable Court enter an order granting Plaintiff leave to file an amended complaint and accepting and filing the proposed First Amended Complaint accompanying this Motion.

Dated this 15th day of August, 2011,

s/ James M. Mullins, Jr.
James M. Mullins, Jr. (WV State Bar # 11129)
Attorney for Plaintiff
The Law Offices of James M. Mullins, Jr., PLLC
101 North Kanawha Street, Suite 401
Beckley, WV 25801
Telephone: 304-929-3500 (o)/304-687-5492 (c)
FAX: 304-929-3503
E-mail: jim@mullinslawoffices.com

Certificate of Service

I hereby certify that on August 15, 2011, I electronically filed the foregoing document with the Clerk of the Court, which will send electronic notification of such filing to the following

CM/ECF participant:

Floyd M. Sayre, III
Bowles, Rice, McDavid, Graff & Love, LLP
PO Box 1419
Martinsburg, WV 25402
Attorney for All Defendants

s/ James M. Mullins, Jr.
James M. Mullins, Jr. (WV State Bar # 11129)
Attorney for Plaintiff
The Law Offices of James M. Mullins, Jr., PLLC
101 North Kanawha Street, Suite 401
Beckley, WV 25801
Telephone: 304-929-3500 (o)/304-687-5492 (c)
FAX: 304-929-3503
E-mail: jim@mullinslawoffices.com