UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

TEXAS MEDICAL ASSOCIATION, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, U.S. DEPARTMENT OF LABOR, U.S. DEPARTMENT OF THE TREASURY, OFFICE OF PERSONNEL MANAGEMENT, and the CURRENT HEADS OF THOSE AGENCIES IN THEIR OFFICIAL CAPACITIES, Defendants.	Lead Case: No. 6:22-cv-00372-JDK

PLAINTIFFS LIFENET, INC. AND EAST TEXAS AIR ONE, LLC'S REPLY IN SUPPORT OF THEIR MOTION, IN THE ALTERNATIVE, FOR LEAVE TO FILE AN AMENDED COMPLAINT

INTRODUCTION

Defendants offer only one reason to deny Plaintiffs' motion for leave to amend their complaint (should the Court find such leave necessary[1]): the pending motions for summary judgment. But Defendants' argument rests on a "good cause" requirement that does not apply to Plaintiffs' motion for leave to amend under Rule 15(a)(2). Under the applicable standard of Rule 15, leave should be "freely" granted. And Defendants *still* have not identified any cognizable prejudice to them.

ARGUMENT

I. Defendants Apply Incorrect Legal Standards.

Defendants ignore the legal standard that governs motions for leave to amend in the Fifth Circuit. As explained in Plaintiffs' opening brief, Rule 15 requires the court to grant leave "freely," and courts "must have a substantial reason to deny" Plaintiffs' request. *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002) (citations omitted). When considering whether to grant leave to amend, courts must consider five factors: 1) undue delay, 2) bad faith or dilatory motive, 3) repeated failure to cure deficiencies by previous amendments, 4) undue prejudice to the opposing party, and 5) futility of the amendment." *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004). Defendants ignore these factors and Rule 15(a)(2). They thus fail to establish a basis to deny Plaintiffs' motion.

Defendants instead apply an inapplicable "good cause" requirement, faulting LifeNet for "making no effort to show good cause or excusable neglect." Defs. Br. (ECF 87), at 3. But Rule

[1] Plaintiffs submit this reply brief in support of their alternative Motion for Leave to File Amended Complaint (ECF 84). This is not a sur-reply brief, because it does not address Section I of Defendants' brief (ECF 87), which concerns Defendants' Motion to Strike. Plaintiffs continue to oppose Defendants' Motion to Strike (ECF 81) for the reasons set forth in Plaintiffs' opposition (ECF 84). *See Adrian-Favela v. Empire Scaffold, LLC*, No. 1:13-CV-377, 2015 WL 13694647, at *6 (E.D. Tex. Feb. 13, 2015) (noting "sur-replies are heavily disfavored").

15 does not require a showing of good cause, and Rule 16's good-cause requirement does not apply here. *United States ex rel. Mitchell v. CIT Bank*, N.A., No. 4:14-CV-00833, 2022 WL 213863, at *1 (E.D. Tex. Jan. 24, 2022) ("Rule 15(a) governs a party's request to amend its pleading before a scheduling order's deadline to amend passes. Rule 16(b)(4) governs a party's request to amend its pleading after the deadline to amend passes."). The scheduling order in this case does not set a deadline to amend complaints. *Cf.* ECF 7 (Order on Summary Judgment Briefing and Setting Hearing). Therefore, Plaintiffs do not require the Court to amend a scheduling order, and only the lenient standard of Rule 15 applies.

Apparently aware that Rule 16 is inapplicable, Defendants instead cite Rule 6(b)(1) and Local Rule CV-56(a) as a basis to require a showing of "good cause" and "excusable neglect." Neither rule applies. Under Rule 6(b)(1), "When an act may or must be done within a *specified time*, the court may, for good cause, extend the time . . . before the original time or its extension expires; or . . . after the time has expired if the party failed to act because of excusable neglect." (emphasis added). Plaintiffs do not move to extend any deadline. The Court has set no deadline to amend, and Defendants cite no authority for the proposition that Rule 6(b)(1)'s "good cause" requirement overrides the lenient standard of Rule 15. *See* Rule 15(a)(2) ("The court should freely give leave when justice so requires."). Such a proposition would override all distinction between Rules 15 and 16. Meanwhile, Local Rule CV-56(a) says nothing about either amending pleadings or good-cause requirements. Instead, Local Rule CV-56(a) governs the content of a motion of summary judgment. Plaintiffs do need to establish "good cause" to amend at this stage.

II. The Court Should Grant Plaintiffs' Motion Notwithstanding Parties' Summary Judgment Motions

Defendants advance only one basis to deny Plaintiffs' motion: the pending motions for summary judgment. Defendants rely on a series of soundbites to establish the proposition that a

summary judgment motion trumps the right to amend. Viewed in context, none of Defendants' caselaw justify their invented rule.

For example, Defendants cite a statement in *Mauer v. Wal-Mart Stores, Inc.*, No. 3:16-CV-2085-BN, 2017 WL 6406619, at *2 (N.D. Tex. Dec. 15, 2017) that "[w]hen leave to amend is sought after a summary judgment motion has been filed, courts routinely decline to permit the moving party to amend." Opp. Br. at 4. But that section of *Mauer* concerned the "good cause" requirement of Rule 16, which applied because the deadline to amend set by the court's scheduling order had already passed. *Mauer*, No. 3:16-CV-2085-BN, 2017 WL 6406619, at *1-2. In fact, the court subsequently contrasted that requirement with the liberal standard of Rule 15, which applies here. *Id*. at *3. Moreover, "the most critical issue" leading the court to deny leave in *Mauer* had nothing to do with summary judgment motions: rather, the court refused to allow new allegations that would require reopening discovery and continuing an existing trial date. *Id.* at *4.

Overseas Inns S.A. P.A. v. United States, 911 F.2d 1146, 1151 (5th Cir. 1990), cited by Defendants at page 4, also did not turn solely on a pending motion for summary judgment. In *Overseas*, the court highlighted the plaintiff's delay of two-and-a-half years before seeking leave, following "[e]xtensive prelawsuit and pretrial proceedings." *Id.* No such delay occurred in the present case. Whereas *Overseas* sought to allege a new substantive theory of liability, East Texas Air One simply seeks to join LifeNet's existing claims. *Id.* at 1148. Finally, the Fifth Circuit reviewed the district court's decision to deny leave under a deferential abuse of discretion standard. *Id*. at 1150. The Fifth Circuit never suggested that instead granting leave to amend would have been inappropriate.

Defendants next cherry-pick a quotation from the out-of-circuit case of *Doe ex rel. Doe v. School District of City of Norfolk*, 340 F.3d 605, 615 (8th Cir. 2003), which held that the district

court did not abuse its discretion by denying leave to amend. In addition to a pending summary judgment motion, however, the Eighth Circuit also highlighted an approaching trial date and the plaintiff's attempt to revive claims against defendants who had previously been dismissed from the case. *Id*. at 616. This final consideration received the greatest emphasis because "different considerations apply when a party seeks to amend the pleadings after the district court dismisses the complaint." *Id*. (citations omitted). These additional factors in *Doe*—ignored by Defendants—find no parallel in the present case.

In *Little v. Liquid Air Corp.*, 952 F.2d 841, 846 (5th Cir. 1992), *rev'd on other grounds on reh'g en banc*, 37 F.3d 1069 (5th Cir. 1994),[2] the court principally denied leave because the "amendment would have radically altered the nature of the trial on the merits" by transforming a failure-to-warn case into one about product defects. By "establish[ing] an entirely new factual basis for the plaintiffs' claims," the amendment "would have required that the parties reopen discovery and alter their trial strategies." *Id*. In contrast, LifeNet and East Texas Air One do not seek to change their substantive theories of liability. The Fifth Circuit did highlight the "tardiness of the plaintiffs' motion" given its "significant tendency to disrupt trial proceedings." *Id*. But the Court grounded that "tardiness" in *two* factors. The first was plaintiffs' failure to seek leave "until well over a year after they had instituted their actions and several months after discovery on the actions had effectively terminated." *Id*. The pending summary judgment motion was a "significant" second factor, but the Court noted that a summary judgment motion "does not *in*

[2] The *en banc* court agreed with the panel vis-à-vis amendment "for the reasons stated in the panel's opinion" and "in the light of the late date at which the plaintiffs moved to amend their complaint and the extensive legal and factual changes included in the proposed amended complaint." *Little*, 37 F.3d 1069, 1073 n.8.

itself extinguish a plaintiff's right to amend." *Id*. n.2. The Fifth Circuit even invited the plaintiffs to renew their motion for leave to amend, on remand. *Id*. at n.3.

III. Defendants Are Not Prejudiced

Finally, Defendants still have not shown how allowing Plaintiffs leave to amend would unfairly prejudice them. They have not identified any legal or factual argument that they cannot raise before the Court because of the timing of the proposed amendment. Nor have Defendants explained how their alternative proposal—that East Texas Air One file a separate lawsuit—would impose a lesser burden on them or on this Court.

CONCLUSION

Plaintiffs LifeNet and East Texas Air One respectfully ask the Court to deny Defendants' motion to strike or, in the alternative, grant them leave to file the Amended Complaint.

Dated: December 16, 2022

BY:

<u>/s/ Max I. Straus</u>
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CERTIFICATE OF SERVICE

I certify that on December 16, 2022, the foregoing document was filed electronically and served upon all counsel of record via the Court's CM/ECF filing system in accordance with the Federal Rules of Civil Procedure.

/s/ Max I. Straus
Max I. Straus *(pro hac vice)*