

Support of Motion to Amend the First Amended Complaint. Docket No. 237. Cigna has filed a Response in Opposition to Relator's Motion for Leave to Amend. Docket No. 238. Relator has filed a Reply. Docket No. 240. For the reasons stated herein, Relator's motion is **GRANTED**.

II. LAW AND ANALYSIS

A. Local Rules 7.01 and 15.01

Local Rule 7.01 states in part that

In cases in which all parties are represented by counsel, all motions, except motions under Rule 12, 56, 59, or 60, but including discovery motions, must state that counsel for the moving party has conferred with all other counsel, and whether or not the relief requested in the motion is opposed. In those instances where counsel for the moving party is unable to confer with all other counsel, the motion must describe all attempts made to confer with counsel and the results of such attempts.

LR 7.01(a)(1). Similarly, Local Rule 15.01(a)(2) mandates that “[i]n cases in which all parties are represented by counsel, state that counsel for the moving party has conferred with all opposing counsel about the proposed amendment and whether or not the motion to amend is opposed.” Further, Local Rule 15.01(b) requires that “amended pleadings must restate the entirety of the pleading with the amendments incorporated, rather than merely reciting the amended sections.”

Cigna first argues that Relator failed to confer with Cigna prior to filing his Motion to Amend, thus failing to comply with the Local Rules. In his Reply, Relator concedes that he did not confer with Cigna a second time because “counsel for Relator did not see the need to ask Defendants a second time as to what their position was. Docket No. 240, p. 1.

The Court ordered the Parties to meet and confer, and Relator has since complied by filing a notice with the Court that the parties met and conferred on June 6, 2023. Docket No. 249.

Therefore, Cigna's argument that the Motion should be denied on the grounds that Relator did not comply with the Local Rules is moot.

B. Motions to Amend under Fed. R. Civ. P. 15 and 16

There are two potential standards to consider when determining whether to grant a motion to amend. Rule 16 requires the judge to issue a scheduling order, and provides that “[a] schedule may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). The purpose of this requirement is “to ensure that at some point both the parties and the pleadings will be fixed.” *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003), quoting Fed. R. Civ. P. 16, 1983 advisory committee’s notes (internal quotation marks omitted). In contrast, Rule 15 contains a liberal standard instructing that “courts should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). The decision of which standard to apply depends on the timing of the motion. “Once the scheduling order’s deadline passes, a plaintiff first must show good cause under Rule 16(b) for failure earlier to seek leave to amend before a court will consider whether amendment is proper under Rule 15(a).” *Leary*, 349 F.3d at 909. In this instance, the deadline for motions to amend is September 14, 2023. Docket Nos. 229, 234. Relator filed his motion on May 1, 2023, well before this deadline. Docket No. 236. Therefore, the Court will evaluate the motion under the standard set forth in Rule 15.

Under Rule 15, while leave to amend should be “freely given when justice so requires,” leave to amend should be denied when “it would result in undue delay or prejudice to the opposing party . . . or where the amendment is futile.” See *Foman v. Davis*, 371 U.S. 178 (1962); *Duchon v. Cajon Co.*, 791 F.2d 43 (6th Cir. 1995). “Thus, leave should be given unless there is a showing of undue delay, bad faith or dilatory motive on the part of the moving party, undue prejudice to

the non-moving party, or futility of the proposed amendment.” *Dyer v. Wiregrass Hospice, L.L.C.*, 532 F. Supp. 2d 933, 935 (M.D. Tenn. 2008), *citing Foman*, 371 U.S. at 182.

C. Rule 15 and Relator’s Motion for Leave to Amend

1. Undue Prejudice

While Cigna does not separately address the undue delay and bad faith or dilatory motive factors, Cigna argues that granting Relator’s Motion would be “highly prejudicial” to Cigna because of undue delay. Docket No. 238, p. 13. “In determining what constitutes prejudice, the court considers whether the assertion of the new claim or defense would: require the opponent to expend significant additional resources to conduct discovery and prepare for trial; significantly delay the resolution of the dispute; or prevent the plaintiff from bringing a timely action in another jurisdiction.” *Phelps v. McClellan*, 30 F.3d 658, 662-63 (6th Cir. 1994).

Sixth Circuit caselaw makes clear that delay is only disqualifying if it causes prejudice; that is, delay and prejudice are not synonymous. *See Tefft v. Seward*, 689 F.2d 637, 639 n.2 (6th Cir. 1982) (“Delay that is neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself to disallow an amendment of a pleading,”); *Moore v. City of Paducah*, 790 F.2d 557, 562 (6th Cir. 1986) (delay alone, regardless of its length is not enough to bar an amendment if the other party is not prejudiced). Here, Cigna does not indicate how granting this motion would cause Cigna to “expend significant additional resources” or “significantly delay the resolution of the dispute.” *Phelps*, 30 F.3d at 662-63. Rather, Cigna merely asserts that the delay causes prejudice because of Relator’s “inaction for more than two years[,] ... as well as his lack of any persuasive explanation for failing to seek to leave sooner.” Docket No. 238, p. 14. Again, length of time is insufficient to deny a leave to amend. *See Moore*, 790 F.2d at 562. Further, as previously stated, this Court has already held that the deadline for

parties to file motions to amend is September 14, 2023, and Relator has timely filed this motion well before that date. Docket Nos. 234, 236. Therefore, Cigna's argument that Relator's delay would be highly prejudicial to Cigna is not viable.

This is not a situation where leave to amend is sought on the eve of trial after the discovery period has long passed. *See United States v. Midwest Suspension & Brake*, 49 F.3d 1197, 1202 (6th Cir. 1995). The Court of Appeals for the Sixth Circuit has held that it would be error to deny leave to amend when "the rejection . . . would preclude plaintiff's opportunity to be heard on the merits on facts which are well known to the parties and which were pleaded at the outset . . ." *Moore*, 790 F.2d at 562; *accord, Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 484 (6th Cir. 1973) (affirming grant of leave to amend when the defendant "was aware of the fact situation upon which the amended complaint was based"). As stated earlier, Cigna's only argument regarding prejudice is in relation to Relator's "unexplained delay." Docket No. 238, p. 14. Again, this argument is not viable as Relator filed well before the Court's deadline. Consequently, the Court finds that Cigna has not established that granting the Motion will cause undue prejudice.

2. Futility of Relator's Proposed Amendments

Finally, Cigna argues that granting Relator's Motion would be futile. In the Sixth Circuit, any analysis of the futility of proposed amendments is equivalent to the analysis undertaken as part of a Rule 12(b)(6) motion to dismiss. *See Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 421 (6th Cir. 2000). The policy consideration behind futility analysis and motions to amend is to prevent the expenditure of unnecessary effort and resources by the parties as well as the court. *See, e.g., Matlock v. Rose*, 731 F.2d 1236, 1240-41 (6th Cir. 1984). Here, Cigna has already filed a Motion to Dismiss and believes that, even if Relator's motion for leave to amend is granted,

dismissal is appropriate because the proposed amendment fails to cure the defects of his complaint. Docket Nos. 198, 238. As such, reliance on futility as grounds for denying the motion for leave to amend would essentially be ruling on the underlying Motion to Dismiss as well.

Other courts have noted the manner in which these considerations play out:

There is some conceptual difficulty presented when the primary basis for a party's opposition to the filing of an amended pleading is that the pleading is futile, i.e., that it fails to state a claim upon which relief can be granted. A Magistrate Judge cannot ordinarily rule on a motion to dismiss, see 28 U.S.C. § 636(b)(1)(A), and denying a motion for leave to amend on grounds that the proposed new claim is legally insufficient is, at least indirectly, a ruling on the merits of that claim . . . Consequently, rather than determining the actual legal sufficiency of the new claim, in many cases it will suffice to determine if there is a substantial argument to be made on that question and, if so, to allow the amended pleading to be filed with the understanding that a motion to dismiss for failure to state a claim may follow.

Durthaler v. Accounts Receivable Mgmt., Inc., 2011 WL 5008552, at *4 (S. D. Ohio Oct. 20, 2011). *See also Vanburen v. Ohio Dep't of Pub. Safety*, 2012 WL 5467526, at *4 (S. D. Ohio Nov. 9, 2012) (holding that due to this “procedural roadblock,” the better course would be to allow amendment of the complaint with the understanding that a motion to dismiss may follow filing of the amended complaint); *Research Inst. at Nationwide Children's Hosp. v. Trellis Bioscience, LLC*, 2017 WL 1487596, at *3 (S. D. Ohio Apr. 26, 2017). As the court noted in *Durthaler*, “it is usually a sound exercise of discretion to permit the claim to be pleaded and to allow the merits of the claim to be tested before the District Judge by way of a motion to dismiss.” *Durthaler*, 2011 WL 5008552 at *4. *See also Greenwald v. Holstein*, 2016 WL 9344297, at *5 (S. D. Ohio Feb. 3, 2016). In this instance, the non-frivolous claims are of such nature that the Court will exercise its discretion to allow the merits to be tested before the District Judge.

III. CONCLUSION

For the foregoing reasons, Relator's Motion for Leave to Amend the First Amended Complaint (Docket No. 236) is GRANTED. The Clerk is directed to enter Docket No. 250-1 as the Second Amended Complaint. Accordingly, Defendants' Motion to Dismiss Relator's First Amended Complaint Pursuant to Rule 12(b)(6) (Docket No. 198) is DENIED as moot. While this Order does not directly lead to the same consequence for the Government's pending Motion to Dismiss (Docket No. 195), the Court anticipates that the Government may also seek leave to amend in light of the Court's ruling. To aid the efficient management of this case, the Government is ordered to file, no later than July 11, 2023, a status report indicating whether the Government plans to file a motion to amend its Complaint in Intervention (Docket No. 178).

IT IS SO ORDERED



JEFFERY S. FRENSLEY

United States Magistrate Judge