IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Case No. 15-cv-00204-RM-NYW

DAVID ARONSTEIN, *et al.*,

Plaintiffs,

v.

THOMPSON CREEK METALS COMPANY INC., *et al.*,

Defendants.

OPINION AND ORDER

On January 30, 2015, plaintiffs David Aronstein ("Aronstein") and Lesley Stroll ("Stroll, with Aronstein, "plaintiffs") filed a *pro se* First Amended Complaint ("FAC") against defendants Thompson Creek Metals Company Inc. ("Thompson Creek"), Kevin Loughrey ("Loughrey"), Pamela Saxton ("Saxton"), Pamela Solly ("Solly"), James Freer ("Freer"), James Geyer ("Geyer"), Timothy Haddon ("Haddon"), Carol Banducci ("Banducci"), Thomas Oneil ("Oneil"), Denis Arsenault ("Arsenault"), and Wendy Cassity ("Cassity," and when referred to collectively, "defendants"), raising the following three causes of action: (1) securities fraud against defendants under the Connecticut Uniform Securities Act ("the CUSA"); (2) common law fraud against defendants; and (3) negligent misrepresentation against defendants. (ECF Nos. 4, 4-1.)

On January 14, 2016, plaintiffs, through counsel, filed a Motion for Leave to File a Second Amended Complaint ("the motion to amend"). (ECF No. 79.) Attached to the motion to amend was a clean version of the proposed Second Amended Complaint ("SAC") (ECF No. 79-1), various

documents that appear to have been produced during discovery (ECF Nos. 79-1, 79-2), and a document that may have been intended to satisfy the Local Rule requirement for a redlined version of the proposed SAC (*see* ECF No. 79-4).[1] According to plaintiffs, the SAC "contains no new causes of action, no new theories of law, removes a number of individual Defendants, and only contains new allegations of false representations and omissions to the extent that those became apparent as a result of Defendants' partial document production." (ECF No. 79 at 10-11.)

Defendants filed a response to the motion to amend (ECF No. 82), and plaintiffs filed a reply in support (ECF No. 87). After referral (ECF No. 80), U.S. Magistrate Judge Nina Y. Wang entered a report and recommendation ("R&R"), recommending that the motion to amend be denied (ECF No. 97). Plaintiffs have filed objections to the R&R (ECF No. 110), and defendants have filed a response to those objections (ECF No. 122).

I. Legal Standard

"After a scheduling order deadline, a party seeking leave to amend must demonstrate (1) good cause for seeking modification under Fed.R.Civ.P. 16(b)(4), and (2) satisfaction of the [Fed.R.Civ.P.] 15(a) standard." *Gorsuch, Ltd., B.C. v. Wells Fargo Nat. Bank Ass'n*, 771 F.3d 1230, 1240 (10th Cir. 2014). Good cause under Fed.R.Civ.P. 16(b)(4) ("Rule 16(b)") may be met if a

[1] The Court says "may have been intended" because the document certainly does not comply with Local Rule 15.1(b)'s requirement that a redlined version of a proposed amendment be submitted. That Local Rule requires the redlined version to strike through the text to be deleted and underline the text to be added. The document only strikes through text. (*See generally* ECF No. 79-4.) In fact, the document strikes through virtually all of the text, including what appears to be all of the factual allegations. Most interesting, at least for a redlined version, the document is substantially shorter than the clean version of the SAC. (*Compare* ECF No. 79-1, *with* ECF No. 79-4.) Given that plaintiff added and struck out text from the FAC, it is hard to discern how the redlined version could be shorter, let alone 18 pages shorter, than the clean version.

plaintiff learns new information from discovery. However, "[i]f the plaintiff knew of the underlying conduct but simply failed to raise [his claims] … the claims are barred." *Id*.

Pursuant to Fed.R.Civ.P. 15(a)(2) ("Rule 15"), a party may amend its pleading with the opposing party's consent or leave of court, with the court "freely giv[ing] leave when justice so requires." This standard means that leave to amend is not justified when there has been "undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or the futility of amendment." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).

A delay is undue "when the party filing the motion has no adequate explanation for the delay." *Id*. at 1365-66. This includes where the plaintiff "is using Rule 15 to make the complaint a moving target, to salvage a lost case by untimely suggestion of new theories of recovery, to present theories seriatim in an effort to avoid dismissal, or to knowingly delay raising an issue until the eve of trial." *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1206 (10th Cir. 2006) (quotations, internal quotation, citations, and alterations omitted). An amendment is prejudicial when it unfairly affects a party's preparation of its defense, which most often occurs "when the amended claims arise out of a subject matter different from what was set forth in the complaint and raise significant new factual issues." *Id*. at 1208.

II. Review of a Magistrate Judge's Report and Recommendation

A district court may refer pending motions to a magistrate judge for entry of a report and recommendation. 28 U.S.C. §636(b)(1)(B); Fed. R. Civ. P. 72(b). The court is free to accept, reject, or modify, in whole or in part, the findings or recommendations of the magistrate judge. 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72(b)(3). A party is entitled to a *de novo* review of those portions of the

report and recommendation to which specific objection is made. *See* Fed.R.Civ.P. 72(b)(2), (3). "[O]bjections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review."[2] *United States v. 2121 E. 30 St.*, 73 F.3d 1057, 1060 (10th Cir. 1996); *see also Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) ("In the absence of timely objection, the district court may review a magistrate's report under any standard it deems appropriate.").

III. The Magistrate Judge's Recommendations

The Magistrate Judge provided several reasons for denying the motion to amend. First, the Magistrate Judge found that Rule 16(b) applied, and thus, plaintiffs were required to show good cause for seeking to amend the FAC. (ECF No. 97 at 8-10.) The Magistrate Judge then found that plaintiffs failed to show good cause for an amendment because plaintiffs possessed the information underlying the changes in the SAC six months before filing the same, and plaintiffs chose to wait to file the SAC until they received further discovery. (*Id*. at 11-13.) Second, the Magistrate Judge found that plaintiffs failed to satisfy Rule 15. (*Id*. at 15-18.) The Magistrate Judge found that allegations about certain defendants exercising stock options and selling stock were not new, and plaintiffs had failed to object to the recommended dismissal of the same defendants. (*Id*. at 15-16.) The Magistrate Judge further found that allegations about a Credit Agreement were substantively

[2] Defendants raise an argument pertaining to the timeliness of plaintiffs' objections. (ECF No. 122 at 4-5.) On the face of the record, there is some appeal to defendants' argument, in that the R&R was filed on May 16, 2016 (ECF No. 97), while plaintiffs' objections were not mailed to the Court until June 4, 2016 (*see* ECF No. 110 at 20). In other words, plaintiffs' objections were mailed 19 days after the filing of the R&R. Defendants assert that objections were due on June 3, 2016 after extra days are added to the usual 14-day deadline, pursuant to Fed.R.Civ.P. 6(d). (ECF No. 122 at 4.) However, it is not clear when plaintiffs were served with the R&R. There is no entry on the CM/ECF system that the R&R was mailed to plaintiffs. In addition, given that, when the R&R was entered, plaintiffs were again proceeding *pro se*, the Court does not believe that the R&R was electronically sent to them, at least not on May 16, 2016. Therefore, on the current record, the Court is unprepared to find plaintiffs' objections untimely.

no different from allegations raised in the FAC, which the Magistrate Judge had recommended should be dismissed, and thus, any amendment would be futile. (*Id*. at 16-17.)

IV. Plaintiffs' Objections

First, plaintiffs object to the application of Rule 16(b). (ECF No. 110 at 7-9.)[3] Specifically, plaintiffs argue that, because a deadline for amending pleadings was not set in this case, Rule 16 cannot apply. (*Id*.) Second, plaintiffs argue that, even if Rule 16(b) applies, they have satisfied it because they learned information from documents produced in June/July 2015 and December 2015, and it was reasonable to wait for further discovery to be produced. (*Id*. at 10-13.) Third, plaintiffs argue that Rule 15 has been satisfied. (*Id*. at 13-17.) With respect to allegations about insider trading, plaintiffs assert that they obtained information to support the same during discovery. (*Id*. at 13-14.) Plaintiffs also assert that there would be no undue prejudice in allowing leave to amend. (*Id*. at 14-17.)

V. Discussion

A. Rule 16(b)

The Court notes that a significant amount of time on this matter has been spent on the procedural history of this case and how that history impacts plaintiff's request for leave to amend. The tone was set from the get-go in the motion to amend, where plaintiffs set forth a detailed recitation of their account of procedural events, obviously anticipating that the timeliness of their request was to play a great role in whether it would be granted. This tone was perhaps understandable in light of the Scheduling Order entered in this case and the minutes of the Scheduling Conference before the Magistrate Judge. Specifically, during the Scheduling

[3] The Court uses the page numbering ascribed by the CM/ECF system, rather than the parties' numbering system, i.e., not the numbers at the bottom of each page.

Conference, the Magistrate Judge explained that any future pleading amendments would require Court leave and would need to satisfy both Rule 16(b) and Rule 15(a). (ECF No. 75 at 2.) This directive was effectively repeated in the Scheduling Order. (ECF No. 76 at 14.) In other words, an actual final time or date for the amendment of pleadings was not set in the Scheduling Order. (*See id*; *see also* ECF No. 97 at 8.)

Cutting to the chase, this Court simply does not agree that Rule 16(b) applies here. The Court acknowledges that a fair amount of time has passed since the filing of this case and that plaintiffs have previously amended their complaint, but Rule 16(b) specifically states that the good cause requirement applies to modifying a *schedule*. *See* Fed.R.Civ.P. 16(b)(4). Here, in no normal sense, can the Magistrate Judge's instruction, that no further amendments would be allowed without leave of Court, be considered a schedule. As such, there is no schedule or date that plaintiffs are actually seeking to modify, and thus, Rule 16(b) does not apply.

B. Rule 15

The Court can quickly dispense with the alleged amendments pertaining to the Credit Agreement. As all parties appear to agree, those allegations in the SAC are essentially identical to the ones made in the FAC. (*See* ECF No. 82 at 7; ECF No. 110 at 14.) Given that the allegations are the same, their inclusion in the SAC can hardly be described as an amendment. In any event, in light of this Court's June 20, 2016 Opinion, in which the Court, *inter alia*, allowed to proceed "plaintiffs' claim under the CUSA pertaining to the Credit Agreement to the extent that the claim relies upon omissions in: the investor presentations on April 25, 2011, June 6, 2011, November 7, 2011, and February 27, 2012; the November 11, 2011 conference call; and Solly's email to Aronstein

after the November 11 conference call" (*See* ECF No. 123 at 21), *the same allegations* in the SAC will also be allowed to proceed.

1. Undue Delay

As an initial matter, the Court notes a number of problems with plaintiffs' presentation of facts and arguments with respect to their motion to amend. First, as noted *supra*, plaintiffs failed to attach a compliant redlined version of their amended complaint. Compounding this error, in the motion to amend, plaintiffs failed to explain precisely what was being amended in their complaint. Instead, plaintiffs spent the vast majority of the motion to amend explaining the procedural history of this case, and then explaining why their request for leave to amend was not unduly delayed based on that history. (*See generally* ECF No. 79 at 3-6, 8-11.)

This problem leads into the second. In their motion to amend, plaintiffs assert that all of the changes to their complaint are predicated upon facts learned during discovery. (ECF No. 79 at 12-13.) Plaintiffs assert further that they obtained new evidence "fewer than 30 days prior" to July 3, 2015, and on or before December 23, 2015. (*Id*. at 4-5.) In other words, there appear to be two relevant times for purposes of assessing the extent of the delay of the motion to amend: sometime in June 2015, and December 23, 2015. The problem is that at no point do plaintiffs attempt to explain when the evidence for each of their amended claims came into their possession. Instead, in their objections, plaintiffs offer the vague assertion that the SAC is made up of a "composite of information" from the two periods. (*See* ECF No. 110 at 10.) Thus, in summary, the Court is attempting to review whether the assertion of unexplained amendments to the complaint has been unduly delayed, with the delay being measured from unknown starting points.

Nonetheless, plaintiffs do argue that, even if all evidence was in their possession as of June 2015, the motion to amend was not unduly delayed because it was reasonable for them to await the production of further discovery so that they could "produce a more complete amendment." (*Id*. at 10-11.) As such, the Court will assess delay from a June 2015 starting point. This still leaves the problem of not knowing precisely what plaintiffs seek to amend in their complaint. Fortunately for plaintiffs, however, defendants have assisted the Court in this regard, in that, in their response to the motion to amend, defendants identify four categories of amended allegations.[4] (*See* ECF No. 82 at 6-8.)

The first category relates to the addition of certain defendants; specifically, defendants James Freer ("Freer"), Denis Arsenault ("Arsenault"), and Wendy Cassity ("Cassity"). (*Id*. at 6.) As an initial matter, at the time the motion to amend was filed, the defendants in question were not being added, as this Court had not yet dismissed them. In any event, now that those defendants have been dismissed, pursuant to the June 20, 2016 Opinion, the effect is that plaintiffs are seeking to add them back into this case via the SAC. Irrespective, the Court finds that plaintiffs are not entitled to add or maintain these defendants in this action. Notably, in a prior round of pleadings, the Magistrate Judge recommended dismissing the complaint against defendants Freer, Arsenault, and Cassity because plaintiffs failed to allege conduct specific to them. (ECF No. 67 at 25-26.) In adopting the Magistrate Judge's report and recommendation on this matter, this Court specifically stated that plaintiffs failed to object to the Magistrate Judge's recommendation to dismiss Freer, Arsenault, and Cassity, and thus, dismissed those defendants. (ECF No. 123 at 5.) Now, plaintiffs provide no explanation, adequate or otherwise, with respect to why they failed to object to the Magistrate

[4] Defendants actually identify five categories, but one of those categories is plaintiffs' allegations with respect to the Credit Agreement, which the Court has already found do not constitute an amendment.

Judge's earlier recommendation to dismiss Freer, Arsenault, and Cassity. (*See* ECF No. 110 at 13-14.) In other words, plaintiffs have failed to explain why they delayed in bringing factual allegations against these defendants.[5] As a result, plaintiffs are not entitled to amend their complaint to add or maintain claims against Freer, Arsenault, and Cassity. *See Frank*, 3 F.3d at 1365-66. Therefore, those defendants remain dismissed from this action.

The second category relates to stock sales/insider trading allegedly made by defendant Loughrey. (ECF No. 82 at 6-7.)[6] It appears to be undisputed that this specific allegation was asserted in plaintiffs' original complaint, but was jettisoned in the FAC. (*See* ECF No. 97 at 15; ECF No. 110 at 13.) Plaintiffs assert that this happened because, although they could remember generally the basis for the allegation, they did not have evidentiary support for it when the FAC was filed, as required by Fed.R.Civ.P. 11 ("Rule 11"). (ECF No. 110 at 13.) Plaintiffs ignore, however, that Rule 11 allows a party to make factual allegations, "if specifically so identified, [that] will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." *See* Fed.R.Civ.P. 11(b)(3). This appears to precisely accommodate the situation outlined in plaintiffs' objections, and thus, the fact that plaintiffs misconstrued the law is no reason for the delay related to this claim. As such, plaintiffs have failed to provide an adequate explanation for why their

[5] The Court acknowledges that the Magistrate Judge's earlier report and recommendation was entered in September 2015, which is obviously before December 23, 2015—the second time period plaintiffs allege resulted in new evidence. However, as discussed *supra*, given that plaintiffs do not explain when the evidence related to any of their amended allegations arose, the Court presumes that all evidence was acquired in June 2015—the first time period.

[6] According to defendants the allegations pertaining to stock sales/insider trading also relate to Freer, Arsenault, and Cassity. (*See* ECF No. 82 at 6.) However, in light of the Court's finding *supra* that Freer, Arsenault, and Cassity remain dismissed, the Court does not further consider whether any specific claims may be brought against them.

allegations about stock sales/insider trading were dropped, only to be re-alleged so much time later; which is reason alone to deny any request to re-allege these facts. *See Frank*, 3 F.3d at 1365-66.

The third and fourth categories relate to alleged misrepresentations concerning the budget overruns at the Endako mine and discrepancies in Thompson Creek's net funding, respectively. (ECF No. 82 at 7-8.) Defendants accurately state that, in the SAC, plaintiffs have entirely removed allegations pertaining to a net funding discrepancy at Thompson Creek. Instead, plaintiffs have made new allegations related to the budget, costs, and financing for a mine known as Mt. Milligan. It also appears that plaintiffs may have possessed the facts related to Mt. Milligan in June 2015. (*See* ECF No. 65 at 3-4 (setting forth various facts related to Mt. Milligan's costs in a July 2015 filing)). Nonetheless, based upon the record before it, the Court does not find that plaintiffs' waiting until January 2016 to assert these facts in the SAC constitutes *undue* delay as explained by the Tenth Circuit Court of Appeals. Notably, these facts pertain to claims that the Magistrate Judge allowed to proceed, or, as discussed *infra*, involve facts that were implicated in claims that the Magistrate Judge allowed to proceed. Thus, it does not appear that plaintiffs are engaging in an effort to replace dismissed primary claims, or raise claims on the eve of trial. *See Minter*, 451 F.3d at 1206. As a result, although the matter is exceedingly close, and influenced by the fairly unique circumstances of this case's procedural history, the Court prefers to lean on the side of lack of undue delay with respect to these categories of amended facts.

This, though, does not leave plaintiffs in the clear, as the "most important" factor in deciding whether to allow leave to amend is the prejudice to the nonmoving party. *See id*. at 1207.

2. Undue Prejudice

In their response to the motion to amend, defendants argue the existence of prejudice on the grounds that: initial disclosures, and requests for production of documents, admissions, and

interrogatories have been exchanged; defendants have received a draft expert report on damages , which is based upon the FAC; the parties would need to submit supplemental disclosures; and defendants would need to reevaluate their strategy and discovery needs. (ECF No. 82 at 18-19.) Defendants add in their response to plaintiff's objections that discovery has closed and dispositive motions have been filed. (ECF No. 122 at 17.) Nowhere in this list of prejudice, however, do defendants explain how preparation of their defense to the amended claims has been unfairly affected.

As the Tenth Circuit has explained, a party's defense preparation is most often affected "when the amended claims arise out of a subject matter different from what was set forth in the complaint and raise significant new factual issues." *Minter*, 451 F.3d at 1208. In that regard, defendants assert that the FAC contains allegations pertaining to Thompson Creek's cash resources to fund the Mt. Milligan and Endako mines, while the SAC contains allegations about Thompson Creek's disclosures on capital estimates needed to complete the Mt. Milligan or Endako mines. (ECF No. 82 at 19.) The Court agrees that these sets of allegations are different: the former involves reported cash on hand to fund certain projects, while the latter involves cash estimates to complete those projects. However, the Court does not agree that these sets of facts arise out of different subject matters and raise significant new factual issues. *See Minter*, 451 F.3d at 1208. Notably, defendants' calculation in the FAC of the alleged funding discrepancy is premised, in part, on Thompson Creek's estimates of cash expenditures for the mine projects. (*See* ECF No. 4 at ¶¶ 99-101, 103-104.) To the extent plaintiffs have veered away from their original allegations and focused instead upon one set of the numbers that went into their original calculations, the Court believes this is more indicative of how discovery can change a plaintiff's vantage point, rather than an attempt

to add wind to the sagging sails of the original vantage.[7] Ultimately, Thompson Creek's cash expenditures on various mine projects have been a focus of this litigation, and thus, the Court does not discern *undue* prejudice on these facts.

The result of all this is that the Court will GRANT the motion to amend, with the following exceptions: (1) defendants Freer, Arsenault, and Cassity will NOT be brought back into this case; (2) defendants need not address plaintiffs' allegations directed toward the stock sales/insider trading of defendant Loughrey; and (3) plaintiffs' claims related to the Credit Agreement will be allowed to the extent permitted in the June 20, 2016 Opinion.

This ruling has a knock-on effect on other motions currently pending. Specifically, a motion for reconsideration of the June 20, 2016 Opinion (ECF No. 141), and opposing motions for summary judgment (ECF Nos. 111, 115). With respect to the former, contemporaneously with this Opinion, the Court is entering an Order denying the motion for reconsideration. With respect to the latter two motions, they, obviously, are not directed toward the amended claims, or, more generally, the SAC. In addition, in the case of defendants, their motion for summary judgment is not addressed to the claims with respect to the Credit Agreement that this Court allowed to proceed in its June 20, 2016 Opinion. (ECF No. 111 at 2 n.3.) As a result, the Court DENIES AS MOOT the opposing motions for summary judgment.

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[7] On the sagging sails front, the Court notes defendants' argument that plaintiffs' amended allegations about cash estimates are deficient, and thus, futile. (ECF No. 82 at 17-18.) At this juncture, the Court does not necessarily disagree with defendants' characterization of the facts related to the cash estimate allegations. However, as with defendants' other arguments regarding futility, this Court prefers to wait until the deficiency (or lack thereof) of the allegations is fully briefed in a dispositive motion. *See Anderson v. Milyard*, 2009 WL 763502, at *1 (D. Colo. Mar. 19, 2009) (explaining that, although the defendants raised a "persuasive futility argument," the court would leave the question to be decided on a fully briefed dispositive motion).

In order to set this case on as speedy a course as possible, the Court sets the following deadlines:

(1) The Court will re-open discovery for a period of sixty (60) days from entry of this Opinion, i.e., until November 14, 2016;

(2) The parties shall have until on or before December 23, 2016 to file motions for summary judgment with respect to the claims raised in the SAC;

(3) The parties shall have until on or before January 20, 2016, to file responses to any motions for summary judgment filed; and

(4) The parties shall have until on or before February 3, 2016 to file replies in support of any motions for summary judgment filed.

To be perfectly clear, **there will be no extensions to the above deadlines absent compelling and exceptional circumstances**, which will not include any dilatory conduct by any of the parties or scheduling around any holidays. To the extent that there is any proven dilatory conduct, the Court will utilize the full panoply of sanctions available under the Federal Rules of Civil Procedure, including Fed.R.Civ.P. 37(b)(2). In addition, to the extent that the parties believe that a scheduling order for this re-opened period of discovery would be helpful, the parties are directed to confer and file a joint proposed scheduling order on or before September 22, 2016.

The Court further notes the following given that the matter has played a central role in the procedural history of this case. No further amendments to the complaint will be allowed in this case unless plaintiffs satisfy both Rule 16(b) and Rule 15, pursuant to *Gorsuch, Ltd., B.C. v. Wells Fargo Nat. Bank Ass'n*, 771 F.3d 1230 (10th Cir. 2014). So it is clear, to the extent that no deadline has been set in this case for the filing of amendments to pleadings, the Court sets the date of this

Opinion, September 15, 2016, as that date. **Thus, any motion to amend that is filed after September 15, 2016 must satisfy both Rule 16(b) and Rule 15.**[8]

VI. Conclusion

For the reasons discussed herein, the Court:

(1) SUSTAINS in part and REJECTS in part plaintiffs' objections to the R&R (ECF No. 110);

(2) ADOPTS in part and REJECTS in part the R&R (ECF No. 97);

(3) GRANTS IN PART and DENIES IN PART the motion to amend (ECF No. 79); and

(4) DENIES AS MOOT defendants' motion for summary judgment (ECF No. 111), and plaintiffs' motion for partial summary judgment (ECF No. 115).

The Clerk is instructed to file a copy of the Second Amended Complaint (ECF No. 79-1) as a separate docket entry.

SO ORDERED.

DATED this 15th day of September, 2016.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

[8] There is no prejudice to plaintiffs in setting this date unilaterally, given that, in the proposed scheduling order, plaintiffs never proposed an actual date for when amendments to pleadings should be filed; instead stating that they would consider the matter at the end of formal discovery. (*See* ECF No. 73 at 14.)