UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KAREN MCPETERS, individually, and on Behalf of those individuals, persons and entities who are similarly situated, Plaintiff,	)	
V.	)	CIVIL ACTION NO. 4:10cv1103
THE HONORABLE FREDERICK E. EDWARDS, BARBARA GLADDEN ADAMICK, DISTRICT CLERK; MONTGOMERY COUNTY, TEXAS, and REED ELSEVIER, INC., d/b/a LexisNexis, Defendants.	)	

APPENDIX TO DEFENDANT REED ELSEVIER, INC.'S RESPONSE TO PLAINTIFF'S OPPOSED MOTION FOR LEAVE TO AMEND COMPLAINT

Tab 1: *Gentilello v. Rege*, Civil Action No. 3:07-CV-1564, 2008 U.S. Dist. LEXIS 50745 (N.D. Tex. June 30, 2008)

Tab 2: *Home Depot U.S.A., Inc. v. Nat'l Fire Ins. Co.*, Civil Action No. 3:06-CV-0073, 2007 U.S. Dist. LEXIS 66696 (N.D.Tex. Sept. 10, 2007)

Tab 3: *In Re Northwest Airlines Corp.*, Case No. 96-cv-74711, 2005 U.S. Dist. LEXIS 44684 (E.D. Mich. Aug. 9, 2005).

Respectfully submitted,

By: /s/ Miranda R. Tolar

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2010, I electronically filed the foregoing **Appendix to Defendant Reed Elsevier, Inc.'s Response to Plaintiff's Opposed Motion for Leave to File Amend Complaint** with the Clerk of Court using the CM/ECF system, which automatically sends an e-mail notification of such filing to the following attorneys of record:

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/s/ Miranda R. Tolar
Miranda R. Tolar

TAB 1

LEXSEE 2008 U.S. DIST. LEXIS 50745

LARRY M. GENTILELLO, M.D., Plaintiff, v. ROBERT V. REGE, M.D. and ALFRED G. GILMAN, M.D., PhD., Defendants.

Civil Action No. 3:07-CV-1564-L

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2008 U.S. Dist. LEXIS 50745

June 30, 2008, Decided
June 30, 2008, Filed

SUBSEQUENT HISTORY: Motion denied by, Stay denied by, As moot, Motion granted by Gentilello v. Rege, 2009 U.S. Dist. LEXIS 106696 (N.D. Tex., Nov. 13, 2009)

COUNSEL: [*1] For Larry M Gentilello, MD, Plaintiff: Charla G Aldous, LEAD ATTORNEY, Aldous Law Firm, Dallas, TX; Jeffrey H Rasansky, Rasansky Law Firm, Dallas, TX; R Brent Cooper, Cooper & Scully, Dallas, TX.

For Robert V Rege, MD, Alfred G Gilman, MD, Ph D, Defendants: Robert F Johnson, III, LEAD ATTORNEY, Gardere Wynne Sewell LLP, Austin, TX.

JUDGES: Sam A. Lindsay, United States District Judge.

OPINION BY: Sam A. Lindsay

OPINION

MEMORANDUM OPINION AND ORDER

Before the court is Defendants' Joint Motion to Dismiss, filed October 2, 2007. After careful consideration of the motion, briefs, response, reply, record, and applicable law, the court **grants in part** and **denies in part** Defendants' Joint Motion to Dismiss.

I. Procedural and Factual Background

This case arises from a dispute over the demotion of a university professor. Larry Gentilello, M.D. ("Gentilello" or "Plaintiff") is a tenured professor at the University of Texas Southwestern Medical School in Dallas ("UTSW Medical School") and formerly served as Chair of Division of Burn, Trauma, and Critical Care ("Division Chair") as well as Distinguished C. James Carrico, M.D. Chair in Trauma ("Distinguished Chair"). Gentilello was removed from his chair positions by his immediate [*2] supervisor, Robert Rege, M.D., Chair of the Department of Surgery at UTSW Medical School ("Rege"), and Rege's immediate supervisor, Alfred Gilman, M.D., PhD. and Dean of the UTSW Medical School ("Gilman," together with Rege, "Defendants").

The facts of this case are largely undisputed. On March 5, 2007, Rege informed Gentilello by letter that he would be removed from his Division Chair and Distinguished Chair positions. The letter cited the following reasons for the action: Gentilello's unprofessional conduct, intimidation of others, inflammatory remarks, and unwillingness to compromise. This letter followed a conversation between Rege and Gentilello concerning the lack of supervision of residents and teaching physicians and the resulting non-compliance

with oversight procedures. In this conversation, Plaintiff mentioned at least two incidents indicative of the lack of supervision: one involving the failure to notify Plaintiff of a scheduled surgery for one of his patients until after it was in progress and another involving a resident's failure to follow proper pre-operative procedures that would have prevented an unnecessary surgery. On May 15, 2007, Gilman delivered a letter to Gentilello **[*3]** finalizing his removal, which also cited his unprofessional interaction with coworkers and lack of professional leadership as causes for the demotion.

Plaintiff contends that the employees of University of Texas Southwestern Medical Center ("UTSW Medical Center") provide substandard care to their patients at Parkland Hospital when compared to the care afforded to patients of other University of Texas Southwestern ("UT Southwestern") facilities. He also contends that this disparity is caused by a practice of discrimination based on the patients' socioeconomic backgrounds. Plaintiff alleges that the lack of supervision of residents and teaching physicians amounts to "improper and illegal patient care." Pl.'s Am. Compl. P 13. Plaintiff also alleges that he was demoted because of the conversation with Rege in which he brought these concerns to Rege's attention and that the reasons given for his removal are false and pretextual. Plaintiff further alleges that his demotion is symptomatic of a UT Southwestern policy to suppress criticism of its patient care practices. Defendants contend that Gentilello was removed for the stated reasons relating to his poor attitude and performance.

On September **[*4]** 13, 2007, Plaintiff filed suit against Defendants seeking damages under 42 U.S.C. § 1983 for two claims of alleged civil rights violations: 1) retaliation for the exercise of free speech in violation of the First Amendment to the United States Constitution and 2) deprivation of a constitutionally protected property right without due process of law in violation of the Fourteenth Amendment to the United States Constitution. Defendants Rege and Gilman filed Defendants' Joint Motion to Dismiss on October 2, 2007.

II. Standard for Dismissal Pursuant to Rule 12(b)(6)

To defeat a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). While a complaint need not contain detailed factual allegations, it must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1965 (citation omitted). The "[f]actual allegations of [a complaint] must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint **[*5]** are true (even if doubtful in fact)." *Id.* (quotation marks, citations, and footnote omitted).

In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mutual Auto. Ins. Co.,* 509 F. 3d 673, 675 (5th Cir. 2007); *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit,* 369 F. 3d 464, 467 (5th Cir. 2004); *Baker v. Putnal,* 75 F.3d 190, 196 (5th Cir. 1996). In ruling on such a motion, the court cannot look beyond the pleadings. *Id.; Spivey v. Robertson,* 197 F.3d 772, 774 (5th Cir. 1999), *cert. denied,* 530 U.S. 1229, 120 S. Ct. 2659, 147 L. Ed. 2d 274 (2000). The pleadings include the complaint and any documents attached to it. *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498-99 (5th Cir. 2000). Likewise, "'[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [the plaintiff's] claims.'" *Id.* (quoting *Venture Assocs. Corp. v. Zenith Data Sys. Corp.,* 987 F.2d 429, 431 (7th Cir. 1993)).

The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid claim **[*6]** when it is viewed in the light most favorable to the plaintiff. *Great Plains Trust Co. v. Morgan Stanley Dean Witter,* 313 F.3d 305, 312 (5th Cir. 2002). A court, however, is not to strain to find inferences favorable to the plaintiff and is not to accept conclusory allegations, unwarranted deductions, or legal conclusions. *R2 Invs. LDC v. Phillips,* 401 F.3d 638, 642 (5th Cir. 2005) (citations omitted). The court does not evaluate the plaintiff's likelihood of success; instead, it only determines whether the plaintiff has a legally cognizable claim. *United States ex rel. Riley v. St. Luke's Episcopal Hosp.,* 355 F.3d 370, 376 (5th Cir. 2004).

III. Discussion

Defendants Rege and Gilman have filed their motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Plaintiff's complaint fails to state a claim upon which relief can be granted. Defendants also argue that the court is barred from hearing this suit by the

Eleventh Amendment. The court first addresses the jurisdictional question and then the sufficiency of each claim.

A. Eleventh Amendment Sovereign Immunity

Defendants argue that Gentilello's claims are barred by the Eleventh Amendment's guarantee of state **[*7]** sovereign immunity because they were acting in their official capacities when they decided to demote him. If Eleventh Amendment sovereign immunity applies, the court lacks jurisdiction to hear the case. *Warnock v. Pecos County,* 88 F.3d 341, 343 (5th Cir. 1996). Plaintiff has amended his complaint to clarify his intent to sue Defendants in their individual capacities only. Because Plaintiff brings suit against Defendants only in their individual capacities, Eleventh Amendment immunity does not apply. *Modica v. Taylor,* 465 F.3d 174, 183 (5th Cir. 2006). After noting Plaintiff's clarification, Defendants concede that Eleventh Amendment immunity does not apply in this case.

B. Free Speech Retaliation

As a professor employed by UTSW Medical School, Gentilello is a public employee for the purpose of the First Amendment retaliation claim. Defendants argue that Gentilello's speech is not protected by the First Amendment because he spoke in his capacity as an employee rather than as a citizen when he criticized the patient care practices at Parkland Hospital. Plaintiff disagrees and argues that because his speech involved matters of public concern, he spoke as a citizen.

To state a claim for First Amendment **[*8]** free speech retaliation, Plaintiff must set forth sufficient allegations that indicate, or from which one can reasonably infer, that "(1) he suffered an adverse employment action; (2) his speech involved a matter of public concern; (3) his interest in speaking outweighs the employer's interest in promoting efficiency in the workplace; and (4) his speech motivated the employer's adverse employment action." *Charles v. Grief,* 522 F.3d 508, 510 n.2 (5th Cir. 2008) (citation omitted). At issue in this case is the second element: whether Plaintiff's speech involved a matter of public concern.

The Supreme Court added a threshold layer of analysis to the element of public concern. *Garcetti v. Ceballos,* 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *see also Davis v. McKinney,* 518 F.3d 304, 312 (5th Cir. 2008). With this addition, the First Amendment analysis has shifted from the "content of the speech to the role the speaker occupied." *Williams v. Dallas Indep. Sch. Dist.,* 480 F.3d 689, 692 (5th Cir. 2007). The court must now first determine whether Plaintiff was speaking as a citizen or as part of his public job before it evaluates whether his speech involved a matter of public concern. *Garcetti,* 547 U.S. at 421; **[*9]** Davis, 518 F.3d at 312. Speech expressed as part of a public job means speech made pursuant to a public employee's official duties. *See Garcetti,* 547 U.S. at 421. "Pursuant to official duties" is defined as "activities undertaken in the course of performing one's job." *Davis,* 518 F.3d at 313. The court looks to a number of factors to determine whether an employee is speaking as a citizen or pursuant to his or her official duties. These factors include job descriptions, whether the employee communicated with coworkers or with supervisors, whether the speech resulted from special knowledge gained as an employee, and whether the speech was directed internally or externally. *See Davis,* 518 F.3d at 312-14. The First Amendment will not protect statements made by public employees pursuant to their official duties. *Garcetti,* 547 U.S. at 421. Even speech of great social importance will not be protected unless it is expressed by an individual speaking as a citizen. *Williams,* 480 F.3d at 692.

In response to Defendants' motion, Plaintiff first attempts to distinguish his speech from the kind of work-related speech the court deemed unprotected in *Garcetti.* In *Garcetti,* the deputy district attorney **[*10]** conducted an investigation into the accuracy of an affidavit used to obtain a search warrant. 547 U.S. at 413-14. The deputy district attorney then wrote memoranda to his supervisors detailing what he considered to be "serious misrepresentations" contained in the affidavit. *Id.* The court determined that this speech was not protected because he spoke pursuant to his duties as a prosecutor. *Id.* at 421. Plaintiff argues that the seriousness of the "concrete violations" he witnessed firsthand distinguishes his case from the investigation into potential violations undertaken in *Garcetti.* Br. in Supp. of Pl.'s Resp. 15. The court finds, however, that Plaintiff confuses the content of the speech with the role of the speaker. The seriousness or veracity of the violations complained of does not affect the role occupied by the speaker in voicing his complaints. "Even if the speech is of great public importance, it is not protected by the First Amendment so long as it was made pursuant to

the worker's official duties." *Williams,* 480 F.3d at 692.

Next, Plaintiff asserts that his speech was not made pursuant to his official duties because it was not required by his job duties. According to Plaintiff, **[*11]** his positions did not require him to "ensure that all residents comply with proper supervision and patient care procedures." Br. in Supp. of Pl.'s Resp. 15. The court is unpersuaded by this argument. Speech that closely relates to the employee's job functions may be considered speech made pursuant to the employee's official duties, even if not required by the employee's job description. *Williams,* 480 F.3d at 693-94. Furthermore, "[s]peech related to an employee's job duties that is directed within the chain of command is not protected." *Davis,* 518 F.3d at 315. Plaintiff relies on a misinterpretation of pre- and *post-Garcetti* precedent to support his contention. For example, Plaintiff relies on *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979), to argue that speech related to an employee's job duties and directed up the chain of command should be protected under the First Amendment. Br. in Supp. of Pl.'s Resp. 15. Plaintiff's reliance on *Givhan* is misplaced. *Givhan* instructs that First Amendment "freedom is [not] lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan,* 99 S. Ct. at 696-97. **[*12]** In other words, that the speech is directed internally rather than externally is not dispositive. *Williams,* 480 F.3d at 694 n1. *Givhan* does not address whether the employee's speech was related to her job duties as a school teacher, nor does the decision turn on such distinctions. Therefore, Plaintiff's characterization of the speech in *Givhan* as "related" to her job duties and his reliance on her First Amendment protection misinterpret *Givhan's* precedential value.

Although Plaintiff places great emphasis on the contention that his speech was not "required" by his job duties, he stops short of alleging that his speech was not "related" to his job duties. Br. in Supp. of Pl.'s Resp 15-16. The court finds that Plaintiff's conversation with Defendant Rege was related to his job duties. The lack of supervision of which Plaintiff complained directly involved at least one of his patients. Even if supervision of residents and teaching assistants were not Gentilello's official responsibility as Department Chair or Distinguished Chair, it is reasonable to conclude that his responsibilities would include the supervision of care provided to his patients. Moreover, Gentilello's position of authority **[*13]** at Parkland Hospital gave him the special knowledge and the opportunity to recognize, identify, and report the perceived deficiencies in patient care up the chain of command to his immediate supervisor. *See Williams,* 480 F.3d at 694 (holding speech was made in course of performing job duties where athletic director's criticism of school principal was possible because of special knowledge and experience with athletic department procedures). Therefore, the court determines that Gentilello spoke as a public employee and not a citizen when he raised his concerns about the lack of supervision.

When all facts as alleged in Plaintiff's Amended Complaint are viewed in the light most favorable to him, Plaintiff fails to present sufficient allegations, which if proved, would show that his conversation with his immediate supervisor was unrelated to his job duties. For this reason, the court determines that Plaintiff has failed to state a claim upon which relief can be granted for First Amendment retaliation.

C. Procedural Due Process

Defendants contend that Gentilello was provided adequate written notice of the reasons for his removal and an adequate opportunity to be heard during a two-month appeal **[*14]** process. Defs.' Mot. To Dismiss PP 11, 12. Defendants also contend that as a part of Gentilello's removal process, he was afforded an investigation by a committee of his peers. *Id.* P 12. Defendants further contend that Plaintiff has failed to specify what additional procedures, if any, would have satisfied due process. *Id.* PP 11-13. Plaintiff does not allege that additional procedures are required. He argues that Defendants' predetermination of the outcome of the current procedures precluded him from receiving fair and adequate process. Br. in Supp. of Pl.'s Resp. 17-18. According to Plaintiff, Defendants conducted the removal process in bad faith after predetermining his demotion for motives other than those stated in the notice letter, and as a result of this bad faith, the procedures in place did not afford Plaintiff a meaningful opportunity to be heard. *Id.*

To state a claim for deprivation of Fourteenth Amendment procedural due process under section 1983, "a plaintiff must first identify a protected life, liberty or property interest and then prove that governmental action resulted in a deprivation of that interest." *Baldwin v. Daniels,* 250 F.3d 943, 946 (5th Cir. 2001) (citation

[*15] omitted). "Procedural due process is not itself an independent right, but merely a condition precedent to the deprivation of a life, liberty or property interest. . . . Once we find that a protected interest is implicated, the question remains what process is due." *Haitian Refugee Center v. Smith,* 676 F.2d 1023, 1037 (5th Cir. 1982) (citation omitted). To determine what process is due, the court must balance three factors: "[] the private interests involved; [] the risk of erroneous deprivation of those interests through the procedures used, and the probable value of additional procedures; and [] the government's interest, including the fiscal and administrative burden that additional procedures would entail." *Williams v. Taylor,* 677 F.2d 510, 514 (5th Cir. 1982). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (citation omitted).

Gentilello complains of the sufficiency of the procedures afforded to him during his demotion. He contends that Defendants formed a bias against him that prevented him from receiving a fair removal process. "An impartial decisionmaker **[*16]** is a basic constituent of minimum due process." *Megill v. Board of Regents,* 541 F.2d 1073, 1079 (5th Cir. 1976); *see also Valley v. Rapides Parish Sch. Bd.,* 118 F.3d 1047, 1052 (5th Cir. 1996). Moreover, "[a]n adjudicative decision maker should be disqualified if he or she has prejudged disputed adjudicative issues." *Valley,* 118 F.3d at 1053. Plaintiff alleges that he spoke with Defendant Rege regarding the lack of adequate supervision, inadequate patient care, and improper operating room and treatment protocol he perceived at UTSW Medical Center and Parkland Hospital. Pl.'s Am. Compl. P 10. According to Plaintiff, following this conversation, Rege failed to address his concerns and instead sent him a letter notifying him of his removal. *Id.* P 12-13. Plaintiff argues that this notice letter provided false justifications for his removal to mask Rege's retaliatory motive. *Id.* P 13. Plaintiff also argues that Gilman then joined in Rege's retaliatory purpose by finalizing Plaintiff's removal. *Id.* P 14. Finally, Plaintiff argues that his removal was driven by Defendants' bad-faith predetermination of the outcome of the removal process. *Id.* PP 13-14. According to Plaintiff, "Defendants' **[*17]** bad faith prevented [him] from obtaining proper due process." *Id.* P 27. Accepting all well-pleaded facts in the complaint as true and viewing them in the light most favorable to Plaintiff, the court finds that Plaintiff states a claim for deprivation of a property interest without due process of law.

IV. Request for Leave to Amend Complaint

Plaintiff asks the court to grant him leave to amend his complaint should Defendants' Joint Motion to Dismiss be granted. Br. in Supp. of Pl.'s Resp. 19. The court may grant leave to amend when justice so requires. Fed. R. Civ. P. 15(a). In this case, justice is not served by permitting Plaintiff to further amend his complaint. The court does not believe that further amendment will result in additional facts that would change the character of Plaintiff's First Amendment retaliation claim because he has pleaded that he was speaking as a citizen. The court has determined, however, that his speech was directly related to the performance of his job. In light of the court's ruling, there are no plausible facts that Plaintiff can plead without changing his theory of the case, and Plaintiff cannot state a claim upon which relief can be granted. Therefore, **[*18]** any further attempts to amend the complaint would be futile and would unnecessarily delay the resolution of Plaintiff's First Amendment claim. Accordingly, the court **denies** Plaintiff's request for leave to amend.

V. Conclusion

For the reasons herein stated, the court determines that the complaint sufficiently alleges a claim for denial of due process, but fails to state a claim for free speech retaliation. Accordingly, the court **grants** Defendants' Joint Motion to Dismiss as to Plaintiff's claim for free speech retaliation and **denies** the motion as to Plaintiff's due process claim.

It is so ordered this 30th day of June, 2008.

/s/ Sam A. Lindsay

Sam A. Lindsay

United States District Judge

TAB 2

LEXSEE 2007 U.S. DIST. LEXIS 66696

HOME DEPOT U.S.A., INC., Plaintiff, VS. NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, Defendant-Third-Party Plaintiff VS. EXPRESS SITE PREPARATION, INC. and AMERICAN EQUITY INSURANCE COMPANY, Third-Party Defendants.

Civil Action No. 3:06-CV-0073-D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

2007 U.S. Dist. LEXIS 66696

September 10, 2007, Decided
September 10, 2007, Filed

PRIOR HISTORY: Home Depot U.S.A., Inc. v. Nat'l Fire Ins. Co., 2007 U.S. Dist. LEXIS 46922 (N.D. Tex., June 27, 2007)

COUNSEL: [*1] For Home Depot USA Inc., Plaintiff: Arthur K Smith, LEAD ATTORNEY, Law Offices of Arthur K Smith, Allen, TX; Kevan I Benkowitz, Law Offices of Kevan I Benkowitz PC, Plano, TX.

For National Fire Insurance Company of Hartford, Defendant: Greta A Matzen, LEAD ATTORNEY, Claudia K Frey, Colliau Elenius Murphy Carluccio Keener & Morrow, Dallas, TX.

For National Fire Insurance Company of Hartford, ThirdParty Plaintiff: Greta A Matzen, LEAD ATTORNEY, Claudia K Frey, Colliau Elenius Murphy Carluccio Keener & Morrow, Dallas, TX.

For American Equity Insurance Company, ThirdParty Defendant: Ellen G Tagtmeier, LEAD ATTORNEY, Robert C Tarics, Gordon & Rees - Houston, Houston, TX; Matthew D Murphey, Tracy Graves Wolf, Gordon & Rees, Dallas, TX.

For National Fire Insurance Company of Hartford, Counter Defendant: Greta A Matzen, LEAD ATTORNEY, Claudia K Frey, Colliau Elenius Murphy Carluccio Keener & Morrow, Dallas, TX.

JUDGES: SIDNEY A. FITZWATER, UNITED STATES DISTRICT JUDGE.

OPINION BY: SIDNEY A. FITZWATER

OPINION

MEMORANDUM OPINION AND ORDER

The court revisits this case in response to plaintiff's second motion for summary judgment, which addresses a limited issue left unresolved by the court's prior summary judgment ruling, and to [*2] decide whether defendant should be granted leave to amend its answer. For the reasons that follow, the court grants plaintiff's second motion for summary judgment and denies defendant's motion for leave to amend.

I

Plaintiff Home Depot U.S.A., Inc. ("Home Depot") sues defendant National Fire Insurance Company of Hartford ("National Fire"), contending that National Fire

failed to comply with a contractual duty to defend Home Depot against claims asserted in a Texas state court lawsuit, *Boxcars Properties, Ltd. v. W. Hills Joint Venture,* No. 22433 (278th Dist. Ct., Walker County, Tex.) (the *"Boxcars Litigation"*). In a prior opinion in this case, *Home Depot U.S.A., Inc. v. National Fire Ins. Co.,* 2007 U.S. Dist. LEXIS 20032, 2007 WL 846525 (N.D. Tex. Mar. 21, 2007) (Fitzwater, J.) (*"Home Depot I"*), the court granted Home Depot's motion for summary judgment on its breach of contract claim against National Fire "to the extent of holding that National Fire breached its duty to defend Home Depot in the *Boxcars Litigation."* 2007 U.S. Dist. LEXIS 20032*[WL]* at *9. The court "limit[ed] its grant of summary judgment to liability alone." 2007 U.S. Dist. LEXIS 20032*[WL]* at *8. It declined to award all the relief that Home Depot sought in its motion, explaining:

> Home Depot maintains **[*3]** that it is entitled to recover $ 128,708.47 for the attorney's fees and costs it incurred in defending its interests in the *Boxcars Litigation.* This figure, however, appears to include not only expenses that Home Depot incurred in defending itself in the *Boxcars Litigation* but some of the attorney's fees and costs it has incurred in prosecuting the instant case. This potentially blends two different decisions, one to be made by the trier of fact and the other to be made by the court. Attorney's fees and costs incurred in the *Boxcars Litigation* defense are determined by the trier of fact as part of Home Depot's breach of contract claim. Those expended in prosecuting the present lawsuit are awarded by the court under the procedures specified in Fed. R. Civ. P. 54(d) and N.D. Tex. Civ. R. 54.1. The court is therefore unable to grant summary judgment awarding Home Depot specific relief on its breach of contract claim without the possibility of awarding duplicative attorney's fees and costs. It will therefore limit its grant of summary judgment to liability alone.

Id.

Home Depot later obtained leave of court under N.D. Tex. Civ. R. 56.2(b) to file a second motion for summary judgment on the **[*4]** remaining issue of attorney's fees and expenses. *See Home Depot U.S.A., Inc. v. Nat'l Fire Ins. Co. of Hartford,* 2007 U.S. Dist. LEXIS 46922, 2007 WL 1969752, at *2 (N.D. Tex. June 27, 2007) (Fitzwater, J.). Home Depot then filed its second motion for summary judgment. Nine days after Home Depot obtained leave to file the motion, National Fire sought leave to file a first amended original answer, affirmative defenses, and original counterclaim. [1]

> 1 Although it does not affect the disposition of this motion, the court notes that use of the term "original" is a misnomer in federal practice. The term "original" probably emanates from Texas state procedure. *See* Tex. R. Civ. P. 46 (referring to "original answer"); *but cf.* Tex. R. Civ. P. 97(a) and (b) (referring to "a counterclaim"). Federal procedure, however, does not use the term "original" when referring to an answer or a counterclaim. *See* Fed. R. Civ. P. 7(a) ("There shall be . . . an answer . . . ."); 13(a) and (b) (referring to "a counterclaim").

The original deadline established by the court's Fed. R. Civ. P. 16(b) scheduling order for filing motions for leave to amend pleadings was April 1, 2007, but the court extended the deadline to August 15, 2007 in response **[*5]** to National Fire's unopposed motion. National Fire sought this relief on the ground that it needed time to develop its third-party claims. Among the amendments that National Fire seeks to make is one asserting a new counterclaim against Home Depot. National Fire relies on this proposed counterclaim to oppose summary judgment. [2] Therefore, the court must first address National Fire's motion for leave to amend before considering Home Depot's second motion for summary judgment.

> 2 National Fire also seeks leave to assert new affirmative defenses. In considering National Fire's motion for leave, however, the court will focus on the counterclaim, because it is alone sufficient to warrant denying the motion.

II

A

National Fire alleges in its proposed counterclaim that its duty to defend Home Depot in the *Boxcars Litigation* gives rise to a contractual subrogation

right--that is, a right to step into Home Depot's shoes--regarding any of Home Depot's claims against other insurers arising out of the *Boxcars Litigation.* One of the insurers against whom Home Depot allegedly has a claim is American Equity Insurance Company ("American Equity"), who was joined as a third-party defendant in November 2006. **[*6]** National Fire maintains that Home Depot impaired its subrogation rights by failing to give American Equity timely notice of the *Boxcars Litigation.* The *Boxcars Litigation* commenced on or about February 17, 2004, but Home Depot did not notify American Equity of the lawsuit until August 8, 2005. National Fire asserts that this effectively precludes any recovery for litigation costs incurred before August 8, 2005. Accordingly, it seeks to offset its liability on the insurance contract by the amount of defense costs it will be unable to recover due to the delayed notice.

B

"It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 330, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971). [3] Leave to amend pleadings "shall be freely given when justice so requires." Rule 15(a). Granting leave to amend, however, "is by no means automatic." *Wimm v. Jack Eckerd Corp.,* 3 F.3d 137, 139 (5th Cir. 1993) (quoting *Addington v. Farmer's Elevator Mut. Ins. Co.,* 650 F.2d 663, 666 (5th Cir. Unit A July 1981)). The district court may consider factors such as undue delay, bad faith or dilatory motive on the part of the **[*7]** movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment. *Id.* (citing *Foman v. Davis,* 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)).

> 3 Because National Fire filed its motion for leave to amend before the court-ordered deadline, the motion is analyzed under Rule 15(a).

"Perhaps the most important factor listed by the Court [in *Foman*] and the most frequent reason for denying leave to amend is that the opposing party will be prejudiced if the movant is permitted to alter his pleading." 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1487, at 613 (2d ed. 1990). For example, a change may be deemed prejudicial "if the amendment substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation." *Id.* at 623. Leave may also be denied "if the court determines that the proposed amendment would result in defendant being put to added expense and the burden of a more complicated and lengthy trial." *Id.* at 626. "As a general rule, the risk of substantial prejudice increases with the passage of time." *Id.* § 1488, **[*8]** at 670.

Additionally, "[t]his court will 'carefully scrutinize a party's attempt to raise new theories of recovery by amendment when the opposing party has filed a motion for summary judgment.'" *Barrow v. Greenville Indep. Sch. Dist.,* 2001 U.S. Dist. LEXIS 20120, at *3 (N.D. Tex. Dec. 4, 2001) (Fitzwater, J.) (quoting *Parish v. Frazier,* 195 F.3d 761, 764 (5th Cir. 1999) (per curiam)). This principle applies with equal force to a new counterclaim that could defeat a summary judgment motion. The court has frequently found prejudice when a party seeks leave to amend after the opposing party has filed a summary judgment motion. *See, e.g., AMS Staff Leasing, NA, Ltd. v. Associated Contract Truckmen, Inc.,* 2005 U.S. Dist. LEXIS 28919, 2005 WL 3148284, at *11 (N.D. Tex. Nov. 21, 2005) (Fitzwater, J.) (denying motion for leave to amend after summary judgment motion filed); *see also Overseas Inns S.A. P.A. v. United States,* 911 F.2d 1146, 1151 (5th Cir. 1990) (holding that "'[t]o grant . . . leave to amend is potentially to undermine [a party's] right to prevail on a motion that necessarily was prepared without reference to an unanticipated amended complaint . . . . A party should not, without adequate grounds, be permitted **[*9]** to avoid summary judgment by the expedient of amending its complaint.'") (quoting this court's opinion below). *A fortiori,* prejudice can easily be found where, as here, leave is first sought after the court has granted summary judgment.

C

Home Depot filed this lawsuit on January 15, 2006. Only after Home Depot moved for and obtained summary judgment in *Home Depot I,* obtained leave to file a second summary judgment motion on June 27, 2007, and over 18 months had elapsed since suit was filed, did National Fire move for leave to amend. Following the court's decision in *Home Depot I,* the only issue that remains between Home Depot and National Fire is the amount of attorney's fees and costs that Home Depot is entitled to recover from National Fire for defending its

interests in the *Boxcars Litigation* and for prosecuting the instant breach of contract claim. *Home Depot I,* 2007 U.S. Dist. LEXIS 20032, 2007 WL 846525, at *8. Granting National Fire leave to assert a new counterclaim *after* Home Depot has obtained summary judgment and *after* Home Depot has filed a second summary judgment motion that, if granted, will result in a final judgment in its favor, would be patently prejudicial.

National Fire maintains that its dilatory **[*10]** conduct is justified because it could not have raised the counterclaim earlier. It posits that, until the court decided in *Home Depot I* that it was contractually liable to Home Depot, National Fire had no subrogation rights to assert and could not have sued Home Depot for impairing these rights. The court disagrees.

First, the premise that National Fire's subrogation rights arose only after the court found it liable on the insurance contract is mistaken. The court's ruling in *Home Depot I* did not create National Fire's duty to defend Home Depot in the *Boxcars Litigation;* rather, the duty was created by the parties' contract, which was already in existence at the time of the *Boxcars Litigation. See Home Depot I,* 2007 U.S. Dist. LEXIS 20032, 2007 WL 846525, at *9 (holding that National Fire had duty to defend Home Depot in *Boxcars Litigation*). Consequently, any subrogation rights corresponding with that duty would also have existed at the time of the *Boxcars Litigation.* National Fire could have asserted these rights at any time. Apparently, it opted not to do so because this would have required that it acknowledge the underlying duty.

Second, it was unnecessary for the court to determine contractual liability before **[*11]** National Fire became aware of, or raised, a claim based on its alleged subrogation rights. This is demonstrated by National Fire's third-party complaint filed against American Equity in November 2006, in which it asserted a contingent right of subrogation in the event it was held liable on the insurance contract. National Fire could similarly have brought a counterclaim against Home Depot based on the impairment of that right, which was in fact required under Rule 13(a) (with inapplicable exceptions, making compulsory any counterclaim arising out of same transaction or occurrence as opposing party's claim).

Furthermore, in evaluating the potential prejudice to Home Depot arising from granting leave to amend, the court also considers the circumstances and effect of granting National Fire's March 30, 2007 motion to extend pretrial deadlines. Had the motion been denied, National Fire's present motion for leave to amend would have been filed after the court-ordered deadline for filing such motions. To obtain the relief that National Fire now seeks, it would have been required first to satisfy the Rule 16(b) good-cause standard for amending the scheduling order and then to have met the Rule 15(a) **[*12]** standard for obtaining leave to amend. *See, e.g., S&W Enters., L.L.C. v. SouthTrust Bank of Ala., N.A.,* 315 F.3d 533, 536 (5th Cir. 2003) ("Only upon the movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave."). National Fire's motion for an extension was not opposed, however, and the court granted it. Home Depot maintains that it did not oppose the motion because National Fire had agreed to stipulate to its claimed attorney's fees and costs. National Fire denies the existence of such an agreement.

Regardless whether there was such an agreement, Home Depot will plainly suffer prejudice due to National Fire's reliance on an erroneous (or at least incomplete) basis to justify extending the deadline for filing motions for leave to amend. National Fire represented only that it needed more time to pursue its third-party claims, and it neither suggested nor disclosed that it intended to file a new counterclaim against Home Depot. It is inconceivable to conclude that, had Home Depot known its own interests were at risk, it would not have opposed the motion.

Accordingly, for **[*13]** the reasons explained, the court holds that National Fire's motion for leave to amend should be denied based on the clear prejudice that Home Depot will suffer if National Fire is allowed at this late date to assert a new counterclaim. [4]

> 4 If National Fire desires to revise its proposed amended pleading to address claims against other parties who remain in the case, it may move for leave to amend within 14 days of the date this memorandum opinion and order is filed. If, as to parties other than Home Depot, the revised pleading is substantially the same as the one the court is now denying, the court will treat it as if it was filed before the August 15, 2007 deadline, meaning that National Fire need only satisfy the

Rule 15(a), not the Rule 16(b), standard.

III

The court now turns to Home Depot's motion for summary judgment on the issue of attorney's fees and expenses incurred in the *Boxcars Litigation.*

As the party bearing the burden of proof on damages, Home Depot must establish the amount of its fees and expenses "'beyond peradventure.'" *Bank One, Tex., N.A. v. Prudential Ins. Co. of Am.*, 878 F. Supp. 943, 962 (N.D. Tex. 1995) (Fitzwater, J.) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)).

Home **[*14]** Depot seeks $ 109,482.39 in consequential damages from defending itself in the *Boxcars Litigation,* composed of $ 93,097.00 in attorney's fees and $ 16,385.39 in litigation expenses. It also seeks its attorney's fees, court costs, and expenses incurred in litigating the present case. National Fire does not dispute the amount of damages that Home Depot seeks for defending itself in the *Boxcars Litigation.* Rather, as discussed above, it relies on a proposed new counterclaim to defeat summary judgment, for which leave to file the pleading has been denied. Considering the evidence on which Home Depot relies, and in the absence of a genuine issue of material fact, the court holds that Home Depot is entitled to summary judgment awarding it $ 109,482.39 in damages from National Fire. The court also holds that Home Depot is entitled to recover its attorney's fees, taxable costs, and recoverable litigation expenses for prosecuting the instant breach of contract action against National Fire. Those fees, costs, and expenses will be awarded in response to timely motions filed under Rule 54(d)(2) and N.D. Tex. Civ. R. 54.1.

* * *

For the reasons set out, Home Depot's July 9, 2007 second motion for **[*15]** summary judgment is granted, and National Fire's July 6, 2007 motion for leave to file first amended original answer, affirmative defenses, and original counterclaim is denied. A Rule 54(b) final judgment in favor of Home Depot against National Fire will be filed today. Home Depot may seek its attorney's fees, costs, and expenses incurred in prosecuting the instant action by filing timely motions under Rule 54(d)(2) and N.D. Tex. Civ. R. 54.1.

SO ORDERED.

September 10, 2007.

SIDNEY A. FITZWATER

UNITED STATES DISTRICT JUDGE

TAB 3

LEXSEE 2005 U.S. DIST. LEXIS 44684

IN RE: NORTHWEST AIRLINES CORP., et al, ANTITRUST LITIGATION

Case Nos. 96-CV-74711, 99-CV-72987, and 99-CV-72988

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2005 U.S. Dist. LEXIS 44684

August 9, 2005, Decided

SUBSEQUENT HISTORY: Objection overruled by, Motion granted by In re Northwest Airlines Corp. Antitrust Litig., 2007 U.S. Dist. LEXIS 5953 (E.D. Mich., Jan. 29, 2007)

PRIOR HISTORY: In re Northwest Airlines Corp., 221 F.R.D. 593, 2004 U.S. Dist. LEXIS 10017 (E.D. Mich., 2004)

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For Delta Air Lines, Incorporated, Defendant: David A. Ettinger, LEAD ATTORNEY, Honigman, Miller, (Detroit), Detroit, MI; Emmet J. Bondurant, II, LEAD ATTORNEY, Bondurant, Mixson, Atlanta, GA; Howard B. Iwrey, [*7] LEAD ATTORNEY, Dykema Gossett (Bloomfield Hills), Bloomfield Hills, MI.

For Airline Reporting Corporation, Defendant: Edwin L. Fountain, Kathryn M. Fenton, LEAD ATTORNEYS, Washington, DC; J. Thomas Lenga, LEAD ATTORNEY, Clark Hill (Detroit), Detroit, MI; Kevin D. McDonald, Sarah D. Mackey, LEAD ATTORNEYS, Jones Day (Washington), Washington, DC.

For Continental Airlines, Incorporated, Movant: Eugene Driker, Morley Witus, Todd R. Mendel, LEAD ATTORNEYS, Barris, Sott, Detroit, MI.

JUDGES: George Caram Steeh, UNITED STATES DISTRICT JUDGE.

OPINION BY: George Caram Steeh

OPINION

ORDER DENYING DEFENDANTS NORTHWEST'S AND DELTA'S RENEWED MOTION FOR SUMMARY JUDGMENT (# 543) AND MOTION FOR § 1292(b) CERTIFICATION (# 542) ON DENIAL OF LEAVE

Defendants Northwest Airlines Corporation, Northwest Airlines, Inc. (collectively "NWA"), and Delta Airlines, Inc. filed a "Renewed Motion for Summary Judgment" on April 29, 2005 as to the class-action plaintiffs' claim under § 2 of the Sherman Act, 15 U.S.C. § 2, of exclusionary conduct premised on NWA's alleged policy of prohibiting travel agents from selling "hidden city" fares to consumers, thereby unlawfully precluding intrabrand [*8] competition. Defendants NWA and Delta also moved on April 29, 2005 for an order under 28 U.S.C. § 1292 certifying the need for an immediate appeal of an order denying defendants' motions for dismissal of plaintiffs' § 2 claim. Oral argument would not significantly aid the decisional process. Pursuant to E.D. Mich. Local R. 7.1(e)(2), it is ORDERED that the motions be resolved without oral argument.

Defendants must first obtain leave to file their renewed motion for summary judgment, as the dispositive motion cut-off date in the latest relevant Scheduling Order is November 30, 2000. *See* August 4, 2000 Pretrial Scheduling Order. A court's scheduling order shall not be modified except on a showing of good cause and by leave granted. Fed. R. Civ. P. 16(b). In addition to addressing the express "good cause" requirement of Rule 16(b), a district court must also evaluate the potential prejudice to the non-movant if leave is granted. *Leary v. Daeschner,* 349 F.3d 888, 909 (6th Cir. 2003). Whether to grant leave under Rule 16(b) is in the district court's discretion. *Id.*

The court is not persuaded good cause exists for again revisiting the [*9] purely legal issue of whether an actionable § 2 Sherman Act claim may be proven under plaintiffs' theory that NWA unlawfully precluded intrabrand competition by prohibiting travel agents from selling "hidden city" fares. Prior to reassignment of the case to this court on May 6, 2005, Federal District Judge Gerald Rosen ruled twice in throughly reasoned published opinions that plaintiffs could, as a matter law, prove an actionable § 2 claim based on the alleged interference with intrabrand competition. *See Chase v. Northwest Airlines,* 49 F.Supp.2d 553, 568-69 (E.D. Mich. Apr. 23, 1999); *In re Northwest Airlines Corp.,* 208 F.R.D. 174, 210 (E.D. Mich. May 16, 2002), *lv. denied,* 310 F.3d 953, *cert. denied,* 539 U.S. 904 (2003)).

The Supreme Court's recent decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.,* 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004), holding that a telephone company's breach of a duty imposed by the Telecommunications Act of 1996 to share its telephone network with competitors did not state

an actionable § 2 Sherman Act claim, does not warrant revisiting the § 2 legal issues **[*10]** previously addressed by Judge Rosen. The holding in *Trinko* is premised on a finding that the defendant phone company's alleged refusal to cooperate equally among competitors did not fall within a limited Sherman Act § 2 exception that "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct." *Id.* at 408. Following a discussion of "refusal-to-deal" precedents, the Court concluded that the defendant telephone company's "alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim." *Id.* at 411. The Court instructed that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue," cautioning that the risk of mistaken inferences of anti-competitive conduct and resulting "false positives counsels against an undue expansion of § 2 liability." *Id.* at 411, 414. According to the Court, the risks of "false positives" in *Trinko* were that a telephone company's intentional failure to provide timely services to a competitor, as required by the Telecommunications Act, might having nothing **[*11]** to do with unlawfully excluding a competitor from the market considering the numerous and highly technical statutory duties owed as viewed within the context of the "incessant, complex, and constantly changing interaction" of incumbent telephone companies and their competitors. *Id.* 414.

Plaintiffs' instant § 2 claims do not fall within the category of "refusal-to-deal" cases addressed in *Trinko.* Nor do plaintiffs' claims involve an analogous industry or complex statutory duty breached by NWA that, within the context of the airline industry, creates an unacceptable risk as a matter of law of "false positive" inferences of unlawful anti-competitive conduct. Defendants' reliance upon *Trinko* for granting leave to file the renewed motion for summary judgment is misplaced.

This lawsuit is over nine-years old. Defendants' arguments regarding the legal viability of plaintiffs' § Sherman Act claims have been addressed by Judge Rosen. *Chase,* 49 F.Supp.2d at 568-69; *In re Northwest Airlines Corp.,* 208 F.R.D. at 210. Good cause does not exist for granting leave to defendants to file another motion challenging the legal sufficiency **[*12]** of plaintiff's § 2 Sherman Act claim. At this juncture of the lawsuit, plaintiffs would suffer unfair prejudice by further delays related to disputed legal issues that have already been adjudicated. Defendants have not shown that good cause exists for now certifying to the Sixth Circuit Court of Appeals that an "immediate appeal" of Judge Rosen's 1999 and 2002 rulings may materially advance the ultimate termination of this litigation.

In closing, the court recognizes that it enjoys discretion in deciding whether to grant defendants leave to file a renewed motion for summary judgment, or to certify Judge Rosen's prior rulings for an immediate appeal under § 1292. Fed. R. Civ. P. 16(b); *Leary,* 349 F.3d at 909; *Sigma Financial Corp. v. American International Specialty Lines Ins. Co.,* 200 F.Supp.2d 710, 713 (E.D. Mich. 2002) ("The decision to certify an appeal pursuant to section 1292(b) is left to the sound discretion of the district court"). In exercising that discretion, the court finds good cause does not exist for granting defendants leave to file a renewed motion for summary judgment, or to now order § 1292 certification of Judge Rosen's May **[*13]** 2002 decision as a means of materially advancing the termination of this lawsuit. Plaintiffs would suffer unfair prejudice by any delay resulting from granting such leave. Accordingly,

Defendants' renewed motion for summary judgment and for a certification order under 28 U.S.C. § 1292 for the need for an immediate interlocutory appeal are hereby DENIED on denial of leave.

SO ORDERED.

s/ George Caram Steeh

UNITED STATES DISTRICT JUDGE

Dated: August 9, 2005