IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

CHRISTOPHER FAIN, *et al.*, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WILLIAM CROUCH, *et al.*,

Defendants.

CIVIL ACTION NO. 3:20-cv-00740

HON. ROBERT C. CHAMBERS, JUDGE

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

Plaintiffs Christopher Fain, Zachary Martell, and Brian McNemar (collectively, "Plaintiffs") respectfully submit this reply in support of their motion to file a First Amended Complaint. Only Defendant Cheatham objects to Plaintiffs' request; no other defendant opposes Plaintiffs' motion. But Defendant Cheatham failed to timely file his opposition, thus waiving his objections. Regardless, even considered on the merits his objections fail.

Defendant Cheatham acknowledges that amendments must be liberally granted under Rule 15 unless a party can demonstrate prejudice, bad faith, or futility. ECF No. 114 at 2 (citing *U.S. v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000)). Defendant Cheatham does not claim bad faith or futility (nor could he), arguing instead that new plaintiffs can only join a suit as intervenors under Federal Rule of Civil Procedure 24, and that he would purportedly suffer prejudice if amendment were permitted. These arguments are inapt. Amendments adding additional plaintiffs routinely are granted under Rule 15, and no prejudice would result from the addition of a plaintiff with claims arising from the same conduct described in detail in the original complaint. Plaintiffs' motion should be granted.

I. DEFENDANT CHEATHAM'S FAILURE TO TIMELY OPPOSE PLAINTIFFS' REQUEST WAIVES HIS OBJECTIONS.

Plaintiffs submitted their motion for leave to file a First Amended Complaint on September 23, 2021. ECF Nos. 106-109. Electronic service was effected the same day by operation of the Local Rules, which provide that a "party may serve a paper … by using the court's electronic transmission facilities …," as Plaintiffs did here. LR Civ. P. 5.1(e). The local rules require that a memorandum in response to a motion "be filed and served on opposing counsel … within 14 days from the date of service of the motion." LR Civ. P. 7.1(a)(7). The 14-day deadline to oppose Plaintiffs' motion expired on October 7, 2021. Defendant Cheatham's opposition was filed on October 8, 2021, but he did not "seek leave of Court for additional time, or provide any justification for [his] failure to do so." *Radfar v. Rockville Auto Grp. LLC*, No. GJH-16-3082, 2018 WL 2972485, at *2 (D. Md. June 12, 2018). Defendant Cheatham thus waived his objections and the Court should decline to consider them. *See, e.g.*, *Feargrounds, LLC v. Old Time Contractors, Inc.*, No. Civ. WDQ-10-0087, 2010 WL 1759577, at *2 (D. Md. Apr. 30, 2010) (finding no abuse of discretion where court refused to consider an untimely opposition). Regardless, as explained below Defendant Cheatham's arguments fare no better on their merits.

II. PLAINTIFFS PROPERLY SOUGHT LEAVE TO AMEND THEIR COMPLAINT UNDER RULE 15 TO ADD ADDITIONAL PLAINTIFFS.

Defendant Cheatham's first objection rests on the false premise that Plaintiffs' motion is a covert attempt by "non-parties" to file a motion to amend the complaint, instead of a motion by Plaintiffs themselves. ECF No. 114 at 3 (claiming that "in reality, it is the two newly proposed plaintiffs seeking an amendment of the Complaint, and not the currently named Plaintiffs"). But motions by existing plaintiffs to add additional plaintiffs to a suit are common practice under

Federal Rule of Civil Procedure 15, and routinely are granted where Rule 15's standards are met. *See, e.g.*, *Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 618 (4th Cir. 2001) (upholding district court's decision permitting addition of seven plaintiffs to suit where they alleged "similar types of violations" and similar principles of law apply); *In re MI Windows & Doors, Inc. Prod. Liab. Litig.*, No. 2:12-cv-02269, 2013 WL 3207423, at *3 (D.S.C. June 24, 2013) (courts "have held that a plaintiff wishing to add other parties to a case may do so by amending his or her complaint pursuant to Rule 15"); *see also* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1474 (3d ed. 2021) ("[A] party may make a Rule 15(a) amendment to add, substitute, or drop parties to the action.") (footnotes omitted).

The proposed addition of these plaintiffs is particularly appropriate here because their claims arise out of the same nucleus of facts alleged in the complaint and share common questions of fact and law. Proposed plaintiff Leanne James challenges the exclusions for gender-confirming care contained in a Public Employees Insurance Agency ("PEIA") health plan that was described and quoted in *identical* terms in the original complaint. *Compare* ECF No. 109 ¶ 108 (Ms. James is enrolled in PPB Plan A), ¶ 66(A) (quoting exclusion in PPB Plan A) *with* ECF No. 1 ¶ 64(A). Ms. James also seeks to bring the same Equal Protection claim against Defendant Cheatham raised by Plaintiffs Zachary Martell and Brian McNemar. *See* ECF No. 109 at 33, Count I (adding Ms. James to Mr. Martell and Mr. McNemar's Equal Protection claim).[1] Her claims thus closely parallel the facts and claims described in the original complaint.

Defendant Cheatham cites two cases about amendments by nonparties, but neither helps

[1] The other proposed new plaintiff, Shauntae Anderson, seeks to raise claims only against the defendants involved in West Virginia's Medicaid program—none of which have objected. Because Ms. Anderson raises no claims against Defendant Cheatham he lacks any basis to object to her proposed claims.

his argument. *Intown Properties Mgmt., Inc. v. Wheaton Van Lines*, Inc., 271 F.3d 164 (4th Cir. 2001), involved two consolidated suits, but consolidation does not "merge the suits into a single cause … or make those who are parties in one suit parties in another." *Id.* at 168 (quote omitted). A party from one suit sought to amend the complaint in the *other* suit to add itself as a plaintiff, thus filing that motion as a *nonparty*. *Id.* at 167. Here, no external party filed the instant motion—the existing Plaintiffs did. *See* ECF No. 108 at 1 ("The existing Plaintiffs, a Medicaid participant and state employee health plan members, seek to add two plaintiffs to the suit."). *Intown* thus says nothing about Plaintiffs' request here. Defendant Cheatham's other authority, *United States ex rel. Little v. Triumph Gear Sys., Inc.*, 870 F.3d 1242 (10th Cir. 2017), itself recognizes that "[m]otions to add or substitute parties are considered motions to amend and therefore must comply with Rule 15(a)." *Id.* at 1248 n.8 (quote omitted). *Triumph*'s observation that non-parties cannot amend a complaint was made in a different context: there, the original plaintiff "vanished" from the amended complaint without any explanation, and the document was actually "filed by" the new plaintiffs without the original plaintiff. *Id.* at 1245. *Triumph* is thus wholly distinguishable from Plaintiffs' request here.

III. RULE 24 STANDARDS FOR INTERVENTION ARE INAPPLICABLE.

Defendant Cheatham claims without support that the sole vehicle through which new plaintiffs may be added to a suit is a Rule 24 motion to intervene. ECF 114 at 4. Apart from describing the intervention standard, however, Defendant Cheatham cites no supporting authority for his argument, and Plaintiffs are aware of none. Indeed, by this logic, no plaintiff could ever join additional plaintiffs or class representatives to a suit after the initial complaint—intervention under Rule 24 would be the only avenue for new plaintiffs to enter a suit. This does not resemble federal practice with respect to the amendment of pleadings. Few defendants appear to

have even raised such an argument in this Circuit, but where they have courts have easily dispatched it. *See, e.g.*, *In re MI Windows & Doors,* 2013 WL 3207423, at *3 (rejecting defendant's argument that new plaintiffs must seek to intervene under Rule 24, approving plaintiffs' motion to join additional plaintiffs under Rule 15, and collecting authorities).

IV. NO PREJUDICE WILL RESULT FROM THE AMENDED COMPLAINT.

Defendant Cheatham claims that prejudice results where a proposed amendment involves a new legal theory or facts not already considered by the other party. ECF No. 114 at 2 (citing *Johnson v. Oroweat Foods Co.*, 785 F.2d 503 (4th Cir. 1986)). But as *Johnson* explains, while "prejudice can result where a proposed amendment raises a new legal theory that would require the gathering and analysis of facts not already considered by the opposing party, … that … essentially applies where the amendment is offered *shortly before or during trial*"—which plainly does not apply here. *Id.* at 510 (emphasis added).

Nor does Ms. James' claim involve new facts or theories, and Defendant Cheatham's claim that Ms. James alters the legal theories, discovery, and defenses involved in the case is not correct. ECF No. 114 at 4. As described above, Ms. James seeks to raise an identical Equal Protection claim in the proposed amended complaint to the one raised by Mr. Martell and Mr. McNemar. *See* ECF No. 109 at 33, Count I. She does so on the basis of a health plan and exclusion already described in the original complaint. *Compare* ECF No. 109 ¶¶ 66(A), 108 *with* ECF No. 1 ¶ 64(A).

Further, Defendant Cheatham's claim that Ms. James expands the scope of the case because his "only" prior "role … was related to his relationship with The Health Plan" is fictive. ECF No. 114 at 4. Both the original and proposed amended complaint contain an identical putative "State Employee Health Plan Class" (of which Ms. James is already a member).

Compare ECF No. 1 ¶ 109 *with* ECF No. 109 ¶ 148. That putative class includes "[a]ll people who are enrolled in a State Employee Health Plan and who are either transgender and have sought or will seek gender-confirming care, and/or people whose transgender dependents have sought or will seek gender-confirming care, barred by the Exclusions," and is not limited to those enrolled in The Health Plan. ECF No. 1 ¶ 109. The addition of Ms. James does not change the putative class definition in any respect, and Defendant Cheatham cannot unilaterally diminish the scope of Plaintiffs' claims. Because "defendant was from the outset made fully aware of the events giving rise to the action, an allowance of the amendment could not in any way prejudice the preparation of defendant's case." *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980).

The remainder of Defendant Cheatham's argument relies on the mistaken assumption that Plaintiffs seek leave for Ms. James to raise a Title VII claim before she has finished exhausting it. *See* ECF No. 114 at 4-5 (arguing that because Ms. James is still exhausting her Title VII claim before the U.S. Equal Employment Opportunity Commission ("EEOC"), "at this time, seeking to plead a Title VII claim against Defendant Cheatham would be futile and prejudicial to this Defendant" because he would have to defend the claim "simultaneously" before the Court and the EEOC). Defendant Cheatham is wrong. Plaintiffs have made clear that they do not seek to include Ms. James' Title VII claim "at this time" precisely because the claim is still being exhausted. *See* ECF No. 109 at 2 n.2 ("As alleged in the attached proposed First Amended Complaint," proposed plaintiff "Leanne James anticipates seeking leave to raise claims under Title VII of the Civil Rights Act of 1964 as soon as she has finished exhausting them with the

United States Equal Employment Opportunity Commission"); *see also id.* ¶ 125 (same).[2]

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion for Leave to File a First Amended Complaint.

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Respectfully submitted,

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[2] Although it is unclear, Plaintiffs presume that Defendant Cheatham does not argue that Ms. James should be denied leave to raise an Equal Protection claim against him while he responds to her Title VII charge before the EEOC. The fact that Defendant Cheatham's conduct violates multiple sources of federal law, with different exhaustion requirements, is simply a feature of federal law and not a basis to object to Ms. James' claims.