

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION**

LOREN L. CASSELL et al.,

Plaintiffs,

v.

VANDERBILT UNIVERSITY et al.,

Defendants.

No. 3:16-cv-02086

Judge Crenshaw

Magistrate Judge Brown

JURY DEMAND

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'  
MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

Plaintiffs seek leave under Federal Rule of Civil Procedure 15(a)(2) to file a Second Amended Complaint. Plaintiffs' proposed Second Amended Complaint includes additional factual detail, based on new information, that supports a single new claim (consisting of two new counts) against the same Defendants relating to Defendants' failure to protect Plan assets. Leave to amend should be granted because all of the relevant factors support, rather than oppose, this amendment, and allowing an amendment 18 months before trial and nearly a year before discovery closes would not prejudice any party.

**BACKGROUND**

Plaintiffs commenced this action on August 10, 2016. Doc. 1. On October 25, 2016, the Court adopted the Initial Case Management Order, which among other things states that the deadlines to join additional parties and amend pleadings

“presumes substantial completion of fact discovery in this matter (including production, review, and necessary depositions).” Doc. 37 at 6.

Plaintiffs filed an Amended Complaint on December 12, 2016. Doc. 38. At that time, Plaintiffs did not have access to all the facts necessary to set forth the additional counts they now bring. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009) (ERISA plaintiffs have “limited access to crucial information” that typically is “in the sole possession of defendants”); *Rankin v. Rots*, 278 F. Supp. 2d 853, 879 (E.D. Mich. 2003) (prior to discovery, “the manner in which each defendant, which are in the universe of possible decision makers, operated is . . . something of a black box”).

Defendants moved to dismiss the Amended Complaint on January 16, 2017. Doc. 42. Briefing on the motion was complete on May 7, 2017. Doc. 51. The Court entered its Memorandum and Opinion on Defendants’ motion to dismiss on January 5, 2018. Doc. 65. On February 2, 2018, Defendants filed their Answer and Additional Defenses to the Amended Complaint. Doc. 70.

Pursuant to the Court’s February 8, 2018 case management Order (Doc. 72), the fact discovery deadline is September 28, 2019 (i.e., in 4.5 months), and the expert discovery deadline is March 29, 2019 (i.e., in 10.5 months). To date, neither party has deposed any witnesses, and neither party has substantially completed any aspect of discovery. On March 12, 2018, the Court entered an Order scheduling this case for a jury trial on November 5, 2019 (i.e., in 18 months). Doc. 73.

Plaintiffs' proposed Second Amended Complaint is substantially identical to the currently operative Amended Complaint, except that it includes one new, limited claim relating to Defendants' alleged failure to protect plan assets by allowing third parties to market services to participants (proposed Counts VII and VIII). *See* Ex. 1 to Pls.' Mot. for Leave to File Second Am. Compl.

### **ARGUMENT**

Plaintiffs should be granted leave to file their proposed Second Amended Complaint because the relevant factors strongly support allowing the amendment. Pursuant to Rule 15(a)(2), leave to amend shall be freely given “when justice so requires”—and that “mandate is to be heeded.” *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Miller v. United States*, 561 F. App'x 485, 489 (6th Cir. 2014). This liberal rule gives effect to the federal policy supporting “the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Foman*, 371 U.S. at 181-82 (internal citations omitted).

As the Sixth Circuit has made clear, “[t]he thrust of Rule 15 is to reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings.” *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982) (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). Accordingly, a district court must allow an amendment absent (i) undue prejudice to the opposing party, (ii) undue delay, (iii) bad faith, or (iv) futility of the proposed amendment. *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437, 445 (6th Cir. 2007); *Janikowski v. Bendix Corp.*, 823 F.2d 945, 951 (6th Cir. 1987). Because all of the relevant factors strongly support granting leave

to file the proposed Second Amended Complaint, Plaintiffs' motion should be granted.

**I. Plaintiffs' Proposed Amendment Will Not Prejudice Any Party**

Granting Plaintiffs leave to file their proposed Second Amended Complaint will not prejudice any party. A Court determines prejudice by considering “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, 662–663 (6th Cir. 1994). “Delay alone is not a ground for denying leave to amend.” *Snead v. Mohr*, No. 2:12-cv-00739, 2014 U.S. Dist. LEXIS 31327, at \*5 (S.D. Ohio Mar. 11, 2014) (citing *Dana Corporation v. Blue Cross & Blue Shield Mutual*, 900 F.2d 882, 888 (6th Cir. 1990)). Instead, the Sixth Circuit “has required ‘at least some significant showing of prejudice’ to deny a motion to amend based solely on delay.” *Prater*, 505 F.3d at 445 (quoting *Moore v. City of Paducah*, 790 F.2d 557, 562 (6th Cir. 1986) (per curiam)). An example of such significant prejudice would be allowing an amendment after discovery is closed and after summary judgment motions are fully briefed. *Siegner v. Twp. of Salem*, 654 F. App'x 223, 228 (6th Cir. 2016) (“Allowing an amendment after discovery is closed and summary judgment motions are “fully briefed” imposes significant prejudice on defendants.”).

Here, allowing Plaintiffs' proposed amendment would not prejudice—let alone significantly prejudice—Defendants. As described above, Plaintiffs' proposed

additional claim is narrowly tailored and arises from the same set of operative facts described in the Amended Complaint, concerns the same subject matter as the Amended Complaint (i.e., alleged fiduciary breaches related to Defendants' administration of its retirement plans), and arises from conduct that is closely related to the conduct that has already been alleged. Moreover, this case is still at an early stage of discovery, no depositions have been taken, the document production and review process is ongoing and has not been substantially completed, and trial is not scheduled to take place until November 2019. Under these circumstances, no prejudice to any party would result from an amendment.

## **II. Plaintiffs Have Not Delayed in Amending**

Leave should additionally be granted because Plaintiffs have not delayed in seeking to amend. Here, as set forth above, Plaintiffs seek leave to file their proposed Second Amended Complaint before deposition discovery has commenced, nearly a year before discovery closes, before the parties have substantially completed the document production and review process, and approximately 18 months before trial. The new claim alleged in the proposed Second Amended Complaint, moreover, arises from recently identified facts. There is no delay, undue or otherwise, under these circumstances.

## **III. Plaintiffs' Proposed Amendment Is Not Made in Bad Faith**

Leave should also be granted because Plaintiffs' proposed amendment is not made in bad faith. Because Plaintiffs seek to amend the complaint nearly a year before the close of discovery and approximately 1.5 years before trial, Plaintiffs do

not anticipate that there will be any need to change any deadlines as the result of their proposed limited amendment. Further, Plaintiffs' new claim is indisputably well grounded in applicable law. There is, and can be, no bad faith under these circumstances. *See, e.g. Blumberg v. Ambrose*, No. 13-15042, 2015 U.S. Dist. LEXIS 50209, at \*3-4 (E.D. Mich. Apr. 16, 2015) (no bad faith even though a plaintiff sought leave to amend "late in the schedule," and further holding that it would be "mere conjecture to infer bad faith from the mere passage of time" prior to seeking leave to amend).

#### **IV. Plaintiffs' Proposed Amendment Is Not Futile**

Plaintiffs' proposed amendment is not frivolous or futile. ERISA imposes strict standards of loyalty and prudence on plan fiduciaries. *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 356 (4th Cir. 2014). The fiduciary duties are ongoing, meaning fiduciaries must continue to review and promptly eliminate any imprudent funds or excessive fee arrangements, no matter how long they have been in place. *Tibble v. Edison Int'l*, 135 S.Ct. 1823, 1829 (2015). Whether a fiduciary has met its duties depends upon an inquiry that "will necessarily be context specific." *Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056, 1061 (M.D. Tenn. 2018) (citing *Pfeil v. State Street Bank and Trust Co.*, 806 F.3d 377, 385 (6th Cir. 2015)).

As this Court has previously made clear, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Cassell*, 285 F. Supp. 3d at 1061. Further, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows

the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Here, this Court has already found that Plaintiffs have stated claims against Defendants (Doc. 65), and the narrow new claim alleged in Plaintiffs’ proposed Second Amended Complaint is both well supported and closely and directly related to the claims that the Court has already found were sufficiently pleaded. Plaintiffs’ proposed amendment, accordingly, is not futile.

### **CONCLUSION**

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their motion for leave to file the proposed Second Amended Complaint.

May 9, 2018

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that, on May 9, 2018, the foregoing document was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system, including the below counsel for Defendants. Parties may access this filing through the Court's ECF system.

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