SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

JEVON GERALD, as lawful Successor of the ESTATE OF LUCIEN EVANS ENGLAND, SR.,	
Plaintiff,	
vs.	**CASE NO. ST-10-CV-631**
R.J. REYNOLDS TOBACCO COMPANY, as successor by merger to LORILLARD TOBACCO COMPANY AND LORILLARD, INC.,	
Defendant.	
CHRISTIAN BROWN, as the Executor of the ESTATE OF PATRICE HALE BROWN,	
Plaintiff,	
vs.	**CASE NO. ST-10-CV-692**
R.J. REYNOLDS TOBACCO COMPANY, as successor by merger to LORILLARD TOBACCO COMPANY AND LORILLARD, INC.,	
Defendant.	

MEMORANDUM OPINION

Pending before the Court is Defendants' November 24, 2015, Emergency Motion to Vacate the Court's Orders Granting Plaintiffs' Motions for Leave to Amend Their Respective Complaints, which, pursuant to the Court's December 21, 2015, Memorandum Opinion and Order, Defendants supplemented by filing their Opposition to Plaintiffs' Motions for Leave to Amend their Complaints on December 30, 2015. Defendants' Emergency Motion to Vacate will be denied because altering or setting aside the contested Orders would not be consonant with justice and different rulings on Plaintiffs' Motions for Leave to Amend their Complaints are not justified.

RELEVANT FACTUAL & PROCEDURAL HISTORY

This tobacco liability litigation arises from Complaints filed by Lucien Evans England, Sr., and Patrice Hale Brown on November 10, 2010, and December 6, 2010, against Lorillard Tobacco Company, Lorillard, Inc., and other Defendants.[1] Both Complaints originally alleged that Defendants were liable under causes of action stemming from Defendants' involvement in the manufacture or sale of cigarettes, including, *inter alia*, strict liability, breach of duty of good faith and fair dealing, negligent performance of a voluntary undertaking, negligence and gross negligence, breach of express warranty, failure to warn, unjust enrichment, intentional and negligent infliction of emotional distress, and "fraud based claims" of fraudulent concealment, fraudulent misrepresentation, civil conspiracy to misrepresent and commit fraud, and aiding and abetting- civil liability. Defendants filed a Notice of Removal in both cases on January 10, 2011, but on September 19, 2011, the cases were remanded to the Superior Court. On August 7, 2014, the Court permitted pre-trial consolidation of both Plaintiffs' cases.

A. Complaint of Plaintiff England, later substituted by Gerald.

While the matter was pending in the federal court, Plaintiff England sought leave to amend the Complaint on March 7, 2011, upon which the Court did not rule. On February 23, 2012, the Court granted England's unopposed motion for leave to substitute the March 7, 2011, proposed amended Complaint with "an even more streamlined . . . [amended] Complaint."[2] This amended

[1] England filed a First Amended Complaint on December 6, 2010.
[2] England moved for leave to file this Substituted Second Amended Complaint on February 22, 2012. Upon the Court granting England leave, England filed the Substituted Second Amended Complaint on February 27, 2012.

Complaint was filed on February 27, 2012, and alleged five (5) counts for strict products liability, negligent performance of a voluntary undertaking, negligence, breach of implied warranty of merchantability, and deceptive and unfair business practices. By doing so, England withdrew some of the counts alleged in the original Complaint, including, *inter alia*, the fraud based claims.[3] Upon the death of England,[4] the Court granted the motion of his son and named executor, Jevon Gerald, to continue the litigation as England's personal representative.[5] On February 6, 2013, Plaintiff Gerald moved for leave to amend the Complaint yet again to assert, *inter alia*, a count for wrongful death and/or survival claims, contending that "[t]he proposed Amended Complaint simply adds a Wrongful Death Count as Count V . . . the [D]efendants benefit from the removal of the previous Count V which alleged violation of the Consumer Fraud and Deceptive Business Practices Act."[6] By Order entered April 22, 2013, Plaintiff Gerald's motion was granted and the amended Complaint, which asserted the following five (5) counts: (1) strict products liability; (2) negligent performance of a voluntary undertaking; (3) negligence; (4) breach of implied warranty of merchantability; (5) wrongful death and/or survival claims, was deemed filed.[7]

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[3] England's February 27, 2012, amended Complaint does not allege individual counts for fraudulent concealment, fraudulent misrepresentation, civil conspiracy to misrepresent and commit fraud, aiding and abetting- civil liability, breach of duty of good faith and fair dealing, failure to warn, unjust enrichment, and negligent and intentional infliction of emotional distress.
[4] According to England's November 9, 2015, Motion for Leave to File Amended Wrongful Death and/or Survival Complaint, Plaintiff Lucien Evans England, Sr., died on November 30, 2012.
[5] *See* January 24, 2015, Order, Case No. ST-10-CV-631.
[6] *See* Gerald's February 6, 2013, Motion for Leave to File Amended Complaint for Wrongful Death.
[7] *Id.*

B. The Complaint of Plaintiff Brown.

After the death of Plaintiff Brown,[8] her son, Christian Brown, moved for substitution of parties as the lawful successor of the Estate of Patrice Hale Brown, which the Court granted on April 2, 2012. Brown sought leave on June 7, 2012, to file an amended five (5) count Complaint for strict products liability, negligent performance of a voluntary undertaking, negligence, breach of implied warranty of merchantability, and wrongful death, which, similar to the amended Complaint filed by England on February 27, 2012, withdrew the counts for the fraud based claims. However, the Court never ruled on Brown's June 7, 2012, Motion for Leave to Amend the Complaint. Brown sought leave to amend the Complaint again on May 30, 2014, upon which the Court also neglected to rule. Consequently, Brown's proposed amended Complaints withdrawing the fraud based claims were never deemed filed by the Court.

C. Contested Orders Granting Plaintiffs Leave to Amend their Complaints.

On November 9, 2015, both Plaintiffs sought leave to amend their Complaints, which the Court granted on November 10, 2015,[9] without providing Defendants an opportunity to respond. On November 24, 2015, Defendants filed an Emergency Motion to Vacate the Court's Orders Granting Plaintiffs' Motions for Leave to Amend Their Respective Complaints, arguing, *inter alia*, that the amended Complaints "add new, substantive claims" by reincorporating the previously withdrawn fraud based claims and assert independent claims against newly added Defendant R.J.

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[8] According to Brown's November 9, 2015, Motion for Withdrawal of Plaintiff's May 30, 2014 Amended Complaint and for Leave to File a Revised Amended Complaint, Plaintiff Patrice Hale Brown died on November 22, 2011.
[9] The Orders were entered on the docket on November 16, 2015.

Reynolds Tobacco Company,[10] which prejudice Defendants because extensive discovery has already been conducted. In their November 24, 2015, motion, Defendants requested the Court vacate its November 10, 2015, Orders granting Plaintiffs leave to amend their Complaints and permit them to file an Opposition to Plaintiffs' Motions for Leave to Amend their Complaints. In addition, Defendants requested an extension of time of sixty (60) days to answer, move, or otherwise plead in response to Plaintiffs' amended Complaints.[11] Plaintiffs filed a response in the form of a joint "Notice to Court and, if Necessary, Request for Time to Oppose Defendants' *Emergency* Motion" on November 25, 2015, to which Defendants filed a Reply on November 30, 2015.

In a Memorandum Opinion and Order entered on December 21, 2015, the Court outlined the standard for altering or setting aside an interlocutory order and concluded that it could not grant or deny Defendants' November 24, 2015, Emergency Motion to Vacate without first reviewing Defendants' Opposition to Plaintiffs' Motions for Leave to Amend their Complaints.[12] Consequently, the Court held its decision on Defendants' Emergency Motion to Vacate in abeyance and directed Defendants to supplement their Emergency Motion to Vacate by filing their Opposition, failing which the Court would deny their Motion.[13] In addition, the Court also held its decision regarding Defendants' request for an extension of time to answer, move, or otherwise

[10] Defendants do not contest the addition of R.J. Reynolds Tobacco Company as a new Defendant in the actions, in its capacity as the successor by merger to Defendants Lorillard Tobacco Company and Lorillard, Inc., but argue that Plaintiffs cannot assert claims against Defendant R.J. Reynolds Tobacco Company in its independent capacity.
[11] Defendants also request the Court shorten Plaintiffs' time to respond to their Emergency Motion to Vacate.
[12] *See* December 21, 2015, Memorandum Opinion, pp. 6-9.
[13] December 21, 2015, Order.

plead in response to Plaintiffs' amended Complaints in abeyance pending the resolution of Defendants' Emergency Motion to Vacate.[14]

In accordance with the Court's Order, Defendants filed a timely Opposition to Plaintiffs' Motions for Leave to Amend their Complaints on December 30, 2015. Plaintiffs filed a timely response on January 11, 2016.[15]

STANDARD

In the December 21, 2015, Memorandum Opinion and Order, the Court outlined three (3) steps that should be taken when deciding whether to grant or deny a request to alter or set aside a prior interlocutory order. First, the Court must determine that the order is, in fact, interlocutory, and therefore amenable to alteration by the Court under its authority to alter its decision prior to entry of [a final] judgment."[16] Second, the Court must consider whether altering or setting aside the interlocutory order "would be 'consonant with justice"[17] under the standard set forth in LRCi 7.3,[18] which requires the motion be based on: "(1) intervening change in controlling law; (2) availability of new evidence, or; (3) the need to correct clear error or prevent manifest injustice."[19] Third, the Court must apply "the legal standard that governed the underlying order that the movant

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[14] December 21, 2015, Order.

[15] *See* December 21, 2015, Order (directing Plaintiffs to respond to Defendants' Opposition to Plaintiffs' Motions for Leave to Amend their Complaints by January 11, 2015).

[16] *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 609 (V.I. 2012).

[17] *Id.* at 616 (citations omitted).

[18] LRCi 7.3 is made applicable to the Superior Court of the Virgin Islands under Super. Ct. R. 7. As explained in the December 21, 2015, Memorandum Opinion, "[b]ecause the Supreme Court of the Virgin Islands has not articulated all the circumstances that 'justify altering an interlocutory order in furtherance of justice, nor are those circumstances delineated in the Virgin Islands Code or the Superior Court Rules, the Court considers the standard governing motions for reconsideration under LRCi 7.3.'" *Island Tile*, 57 V.I. at 616-617 (finding that new evidence uncovered during the discovery process constituted one circumstance justifying the alteration of a prior interlocutory order under the "justice requires" standard but declining to delineate all the circumstances that warrant alteration of interlocutory orders in the "furtherance of justice" because such a determination was not necessary in that case).

[19] *In re Infant Sherman*, 49 V.I. 452, 457 (V.I. 2008) (quoting LRCi 7.3).

requests the trial court to revise" in order to determine whether the circumstances would have justified a different ruling on the underlying motion.[20]

As the Court explained in the December 21, 2015, Memorandum Opinion, the contested November 10, 2015, Orders granting Plaintiffs leave to amend their Complaints are governed by the legal standard applicable to amendments to pleadings. Super. Ct. R. 8 provides:

> The court may amend any process or pleading for any omission or defect therein, or for any variance between the complaint and the evidence adduced at the trial. If a party is surprised as a result of such amendment, the court shall adjourn the hearing to some future day, upon such terms as it shall think proper.

Fed. R. Civ. P. 15 offers further guidance on the amendment of pleadings and advises that, once the twenty-one day statutory period for amendment has expired, a court "should freely give leave [to amend the pleadings] when justice so requires."[21] "The decision whether to grant or deny [a motion to amend] rests within the court's discretion."[22]

"When considering whether to exercise its discretion and give leave to amend, a court should be 'guided by the policy that a party ought to be afforded the opportunity to test the claim on the merits.'"[23] The factors courts consider when evaluating a motion to amend include: delay in

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[20] *Island Tile*, 57 V.I. at 617 ("[I]t is not sufficient to simply provide the trial court with new evidence — rather, the movant must demonstrate that the evidence, had it been previously available to the trial court at the time, would have justified [a differing ruling on the underlying motion]") (citations omitted).
[21] FED. R. CIV. PRO. 15(a)(1)-(2). FED. R. CIV. P. 15 is made applicable to the practice and procedure in the Superior Court through Super. Ct. R. 7. The Court looks to FED. R. CIV. P. 15 for guidance on the standard for granting requests to amend pleadings because its application will not render Super. Ct. R. 8 "wholly superfluous" and Super. Ct. R. 8 does not address this standard. *Santiago v. V.I. Housing Auth.*, 57 V.I. 256, 275 n.11 (V.I. 2012) (citing *Corraspe v. People*, 53 V.I. 470, 482-83 (V.I. 2010) ("[W]hen a Superior Court rule governs the same subject matter as a federal rule, the federal rule cannot apply to Superior Court proceedings pursuant to Superior Court Rule 7 when application of the federal rule would render the Superior Court rule 'wholly superfluous'")).
[22] *Foman v. Davis*, 371 U.S. 178, 182 (1962); *See Daniel v. Government of Virgin Islands*, 30 V.I. 134, 140 (D.V.I. 1994) and *Choate v. Skinner*, 19 V.I. 399 (Terr. Ct. 1983).
[23] *Peters v. V.I. Water & Power Auth.*, 58 V.I. 49, 53 (V.I. Super. Ct. 2013) (citing *Daniel*, 30 V.I. at 140).

bringing the motion, prejudice to the opposing party, and futility of the amendment.[24] A motion to amend "should be denied only where there exists evidence of 'undue delay, bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.'"[25] Nonetheless, "it is the preference of [the Superior] Court, in accordance with precedent from the Supreme Court of the Virgin Islands, that cases be resolved on their merits."[26]

ANALYSIS

Having already determined in the December 21, 2015, Memorandum Opinion that the contested November 10, 2015, Orders granting Plaintiffs leave to amend their Complaints are interlocutory,[27] the Court's decision to grant or deny Defendants' Emergency Motion to Vacate rests on the second and third steps for determining whether to alter or set aside a prior interlocutory order. Specifically, the Court must determine whether the circumstances argued by Defendants demonstrate that altering or setting aside the Orders is "consonant with justice" under LRCi 7.3, and, whether, after applying the legal standard governing amendments to pleadings, different rulings on Plaintiffs' Motions for Leave to Amend their Complaints are justified.

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[24] *See Anthony v. Indep. Ins. Advisors, Inc.*, 56 V.I. 516, 535 (V.I. 2012) (citing *Foman*, 371 U.S. at 182); *See also Peters*, 58 V.I. at 53-54 (citing *Newfound Management Corp. v. Sewer*, 34 F. Supp. 2d 305, 317, 40 V.I. 335 (D.V.I. 1999)).
[25] *Mathes v. Century Alumina Co., LLLP*, 2009 U.S. Dist. LEXIS 63280, *4 (D.V.I. July 23, 2009) (quoting *Foman*, 371 U.S. at 182).
[26] *Adams v. North West Co., Inc.*, 2015 V.I. LEXIS 123, *18-19 (V.I. Super. Ct. Oct. 6, 2015) (citing *Joseph v. Bureau of Corrections*, 54 V.I. 644, 650 (V.I. 2011) ("Both this Court and the United States Supreme Court have recognized that there is a strong preference for trial courts to decide doubtful cases on their merits rather than dismiss them for a failure to strictly follow purely procedural rules").
[27] December 12, 2015, Memorandum Opinion, p. 6.

A. The circumstances argued by Defendants do not demonstrate that altering or setting aside the Orders is "consonant with justice" under LRCi 7.3.

With respect to the second step, Defendants argue that altering or setting aside the November 10, 2015, Orders is "consonant with justice" due to "the need to correct clear error or prevent manifest injustice" under LRCi 7.3.[28] Defendants' argument focuses on the Court's purportedly premature ruling on Plaintiffs' Motions for Leave to Amend their Complaints without affording Defendants an opportunity to submit an Opposition. Having afforded Defendants an opportunity to submit their Opposition and, after considering same, the Court finds it is not necessary to vacate the November 10, 2015, Orders to correct clear error or prevent manifest injustice because, as discussed at length below, justice is best served by allowing Plaintiffs to amend their Complaints and modifying the Scheduling Order. Therefore, altering or setting aside the November 10, 2015, Orders would not be consonant with justice.

B. After applying the legal standard governing amendments to pleadings, different rulings on Plaintiffs' Motions for Leave to Amend their Complaints are not justified.

The last step to consider in determining whether to grant or deny Defendants' Emergency Motion to Vacate is whether, after applying the legal standard governing amendments to pleadings, different rulings on Plaintiffs' Motions for Leave to Amend their Complaints are justified. Defendants argue the Court should have denied Plaintiffs leave to amend their Complaints because the amendments unduly prejudice Defendants and the circumstances demonstrate undue delay, bad faith, and dilatory motive by Plaintiffs in bringing the motions.[29] In contrast, Plaintiffs contend

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[28] Defs.' Emergency Mot. to Vacate, p. 17 ¶ 16 (citing LRCi 7.3).
[29] Defs.' Opp'n. to Pls.' Mot. for Leave to Amend, pp. 5, 9.

that they should have been granted leave to amend their Complaints because both Complaints "always maintained factual allegations sufficient to support" the fraud based claims, and, in *Brown*, that the causes of action pled in the original Complaint remain before the Court because Plaintiff was never granted leave to file the "streamlined version[ ] of the [C]omplaint[ ]."[30] Accordingly, Plaintiffs argue the amendments do not prejudice Defendants so as to justify the denial of leave to amend the Complaints.

a. The Complaints Modified by the November 10, 2015, Orders.

At the outset, the Court must consider which versions of the Complaints were before the Court at the time Plaintiffs were granted leave to amend their Complaints on November 10, 2015, by addressing the effect of an amended pleading on an action. Because Super. Ct. R. 8 "has been regarded as 'merely stat[ing] the general rule that a court can correct errors or defects in pleadings' . . . the Court looks to the standard set out in Rule 15 of the Federal Rules of Civil Procedure for guidance."[31] Fed. R. Civ. P. 15(a)(1) allows a party to amend a pleading as a matter of right and without leave of Court so long as it is made within twenty-one days of service of the original pleading.[32] In all other instances, "a party may only amend its pleading with the opposing party's written consent or the [C]ourt's leave"[33] and, if neither is obtained, the amended pleading "is without legal effect."[34] However, a pleading that is properly amended under Fed. R. Civ. P. 15(a) "supersedes the pleading it modifies and remains in effect throughout the action unless it

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[30] Pls.' Response to Defs.' Opp'n to Pls.' Mot. to Amend, p. 5.
[31] *Pedro v. Ranger American of the Virgin Islands, Inc.*, 2015 V.I. Supreme LEXIS 19, *18 n. 1 (V.I. 2015) (citing *Santiago*, 57 V.I. 256) (internal citation omitted).
[32] *See* FED. R. CIV. P. 15(a)(1)(A)-(B).
[33] FED. R. CIV. P. 15(a)(2).
[34] 6 Wright, Miller, Kane, FEDERAL PRACTICE AND PROCEDURE § 1484, 685 (2010).

subsequently is modified."[35] Thus, "[o]nce an amended pleading is interposed, the original pleading no longer performs any function in the case and any subsequent motion made by an opposing party should be directed at the amended pleading."[36] Further, "the original pleading, once superseded, cannot be utilized to cure defects in the amended pleading, unless the relevant portion is specifically incorporated in the new pleading."[37]

It is undisputed that Plaintiff Brown was not granted leave to amend the Complaint until the contested November 10, 2015, Order because, although Plaintiff Brown moved for leave to amend on two other occasions, the Court did not rule those motions.[38] As a result, these proposed amended Complaints had no legal effect on the proceedings and did not modify or supersede Brown's December 6, 2010, Complaint. Consequently, when conducting fact discovery, the parties in *Brown* were subject to the factual allegations and counts asserted in the original Complaint, which include the fraud based claims for fraudulent concealment, fraudulent misrepresentation, civil conspiracy to misrepresent and commit fraud, and aiding and abetting- civil liability. Likewise, the amendments proposed in Brown's most recent November 9, 2015, Motion for Leave to Amend the Complaint technically modify the original Complaint, rather than the *proposed* amended Complaints that had no legal effect.

Unlike Brown, the Motions for Leave to Amend the Complaint of Plaintiff England, and, upon his death, Gerald as England's personal representative, were granted, resulting in the filing

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[35] *Id.* § 1476 at 636.
[36] *Id.* at 636-638.
[37] *Id.* at 639-640.
[38] The Court recognizes that after the death of original Plaintiff, her son was granted permission to substitute parties as her lawful successor on April 2, 2012.

of amended Complaints, which superseded and modified the original Complaint.[39] Plaintiff is correct that both the February 27, 2012, and February 6, 2013, amended Complaints retained some factual allegations underlying the fraud based claims.[40] However, the February 27, 2013, amended Complaint removed the individual counts asserting the fraud based claims and the February 6, 2013, amended Complaint replaced the count for deceptive and unfair business practices with a count for wrongful death and/or survival claims. Therefore, at the time Plaintiff Gerald sought leave to amend the Complaint for a fourth time[41] on November 9, 2015, the Complaint did not assert counts for the "fraud based claims."

Nevertheless, this does not, *ipso facto*, preclude Plaintiff Gerald from amending the Complaint to reassert the fraud based claims because "plaintiffs are generally permitted to reassert abandoned claims unless 'undue prejudice or delay will result from the amendment.'"[42] In instances such as these, courts have also denied leave to amend on futility grounds, such as when the proposed amendments seek to reassert claims already dismissed by the Court.[43]

b. Prejudice to Defendants.

Defendants argue they will be prejudiced by the amendments because Defendants will be deprived of the opportunity to conduct fact discovery on the fraud based claims since "the parties

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[39] *See* February 23, 2012, Order; England's February 27, 2012, amended Complaint; Gerald's February 6, 2013, Motion for Leave to File Amended Complaint for Wrongful Death; April 22, 2013, Order.
[40] *C.f.* December 10, 2010, First Amended Complaint with February 27, 2012, Second Amended Complaint and February 6, 2013, Amended Complaint for Wrongful Death.
[41] The original Complaint was filed on November 10, 2010, but on December 6, 2010, Plaintiff filed the First Amended Complaint by right and without leave of Court pursuant to Fed. R. Civ. P. 15(a).
[42] *Dilworth v. Goldberg*, 914 F. Supp. 2d 433, 471 (S.D.N.Y. 2012) (citing *Georgiadis v. First Boston Corp.*, 1992 U.S. Dist. LEXIS 2745, *3-4 (S.D.N.Y. Mar. 9, 1992)); *See also Watkins v. Lujan*, 922 F.2d 261, 265 (5th Cir. La. 1991); *Thornton v. Butler*, 2009 U.S. Dist. LEXIS 64820, *27-28 (E.D. Cal. July 27, 2009) (allowing amendment of habeas petition to reassert five claims contained in the initial petition).
[43] *See Schutter v. Herskowitz*, 2008 U.S. Dist. LEXIS 53849, *22 (E.D. Pa. July 11, 2008); *BEG Invs., LLC v. Alberti*, 85 F. Supp. 3d 13, 50-51 (D.D.C. 2015).

proceeded with discovery subject to the understanding that neither Plaintiff would pursue the [f]raud[ ] based [c]laims"[44] and now fact discovery is closed and the original Plaintiffs are deceased.[45] According to Defendants, this "preclude[es] Defendants from discovering the best evidence upon which to prepare their defense . . . [which] require proof of individualized facts specific to both decedents establishing their knowledge of and reliance on alleged statements or concealments by Defendants over multiple decades concerning, among other things, the dangers of smoking."[46] On the other hand, Plaintiffs argue that the amendments do not prejudice Defendants because Defendants had the opportunity to, and did, in fact, conduct fact discovery on the fraud based claims, which have always "flow[ed] from the allegations of the [C]omplaints."[47] Further, Plaintiffs argue the fraud based claims "are proven through experts, government reports[,] and the industry's own witnesses and documents[,]" and "expert discovery has only just begun."[48] The Court recognizes, however, that the deadline for taking expert depositions expired on March 15, 2016.[49]

"As stated by the Third Circuit, 'prejudice to the nonmoving party is the touchstone for denial of amendment.'"[50] "An amendment to a complaint is 'prejudicial' if it places an unfair

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[44] Defs.' Opp'n to Pls.' Mot. to Amend, p. 9. (emphasis omitted).
[45] Defs.' Opp'n to Pls.' Mot. to Amend, pp. 5-9.
[46] Defs.' Opp'n to Pls.' Mot. to Amend, pp. 7-8.
[47] Pls.' Response to Defs.' Opp'n to Pls.' Mot. to Amend, pp. 6, 5-13. Plaintiffs contend that that Defendants' counsel deposed the original Plaintiffs prior to their deaths, in which both Plaintiffs were examined with respect to the fraud based claims, and also deposed "other family members and fact witnesses about the knowledge of both . . . [Plaintiffs] about the addictiveness and/or health hazards of smoking, a perfectly appropriate means to learn about whether either or both relied on anything that Lorillard (directly or through industry groups) were representing about these topics." *Id.* at 7-12.
[48] Pls.' Response to Defs.' Opp'n to Pls.' Mot. to Amend, pp. 12-13.
[49] *See* July 17, 2015, Scheduling Order (setting the deadline for the completion of expert depositions as March 15, 2016).
[50] *Adams*, 2015 V.I. LEXIS 123, at *30 (citing *Cornell & Co., Inc. v. Occupational Safety and Health Review Commission*, 573 F.2d 820, 823 (3d Cir. 1978)).

burden on the opposing party."[51] "In evaluating the extent of prejudice, courts may inquire into the hardship to the non-moving party if leave to amend is denied."[52]

While it is a close call, the Court finds that the prejudice suffered by Defendants does not outweigh the "strong preference for trial courts to decide doubtful cases on their merits" so as to warrant the denial of Plaintiffs' Motions for Leave to Amend their Complaints.[53] Since the commencement of litigation, the Complaints have satisfied the basic pleading requirements of Fed. R. Civ. P. 8[54] by asserting factual allegations that "raise a right to relief above the speculative level'"[55] and "give the defendant fair notice of what the . . . [fraud based] claim[s] [are] and the grounds upon which [they] rest[ ]."[56] Indeed, "'[n]o technical form' is required for pleadings, and the Court construes pleadings 'so as to do justice.'"[57]

Defendants contend "[i]t would be patently unfair to Defendants to permit Plaintiffs to inject into these cases new claims and theories of recovery after the smokers' deaths."[58] However, any prejudice is diminished by Defendants' own concession that original Plaintiffs Brown and England were deposed prior to their deaths, during which they were examined with respect to the fraud based claims.[59] Defendants urge the Court to follow the United States District Court for the

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[51] *Id.* at *43-44 (citing *Pedro,* 2015 V.I. Supreme LEXIS 19, at *20 (Gomez, J., dissenting in part)).
[52] *Cornell*, 573 F.2d at 824 (citations omitted).
[53] *Joseph*, 54 V.I. at 650.
[54] *See Joseph*, 54 V.I. at 649 ("While Superior Court Rule 22 provides that '[a] civil action is commenced by filing a complaint with the court,' no Superior Court rule establishes any standards with respect to the contents of a complaint. Accordingly, Federal Rule of Civil Procedure 8(a)(2) is applicable to civil actions in the Superior Court through Superior Court Rule 7").
[55] *Peters,* V.I. at 54 (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008)); *See also Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965 & n. 3, 167 L. Ed. 2d 929 (2007)).
[56] *Twombly*, 127 S. Ct. at 1964.
[57] *Superior Edge, Inc. v. Monsanto Co.*, 44 F. Supp. 3d 890, 897 (D. Minn. 2014) (citing Fed. R. Civ. P. 8(d)(1), (e)).
[58] Defs.' Opp'n to Pls.' Mot. to Amend, p. 8.
[59] Defs.' Opp'n to Pls.' Mot. to Amend, pp. 2-3 ("After Plaintiffs withdrew their respective Fraud-based Claims in 2012, Defendants, over the next three years, conducted discovery throughout the country limited to Plaintiffs' remaining claims . . . Thus, during the dozens of depositions taken in both cases- with the exception of the depositions

Virgin Islands' ruling in *Williams v. Cost-U-Less, Inc.*,[60] which Defendants argue is "squarely on point."[61] In *Williams*, the District Court affirmed the magistrate judge's denial of plaintiff's motion for leave to file a third amended complaint on the grounds that the amendments would prejudice defendant because the motion was brought after the death of the original plaintiff and the close of fact discovery and sought to add two new causes of action that "involved different elements and facts than in the original complaint."[62] In considering whether the causes of action were in fact "new," the District Court in *Williams* stated that "[s]imply because the facts underlying both claims may have been present when [plaintiff] filed his original Complaint does not negate the fact that [plaintiff] is asserting a new cause of action under an entirely different theory of recovery."[63]

While the Court recognizes the overall similarity between the circumstances in *Williams* and those presented here, the cases are distinguishable in that Plaintiffs alleged the causes of action for the fraud based claims in their original Complaints, while the plaintiff in *Williams* did not. Thus, in *Brown* and *Gerald*, Defendants were put on notice of the fraud based claims from the commencement of litigation, while the defendant in *Williams* was not. Moreover, the District Court's ruling in *Williams* constitutes merely persuasive authority and, unlike the District Court, the Superior Court is bound by "precedent from the Supreme Court of the Virgin Islands[ ] that

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of Mrs. Brown, which was taken in July 2011, and of Mr. England, which was taken in March 2012, just weeks after Plaintiffs withdrew their Fraud-based Claims- Defendants conducted no discovery from the numerous non-party witnesses who were deposed to develop specific, individualized evidence" to defend against the fraud based claims).

[60] 2014 U.S. Dist. LEXIS 90849 (D.V.I. July 3, 2014).

[61] Defs.' Opp'n to Pls.' Mot. to Amend, p. 6.

[62] *Williams*, 2014 U.S. Dist. LEXIS 90849, at *7.

[63] *Id.* at *15.

cases be resolved on their merits."[64] Consequently, the Court is not persuaded by the District Court's ruling in *Williams*.

Furthermore, while both parties argue the scope of fact discovery was the same in both cases,[65] neither mention that the cases were not consolidated for pre-trial purposes until August 8, 2014.[66] Both cases were remanded to the Superior Court on September 19, 2011. Thus, for a period of nearly three years, fact discovery was conducted separately in the cases. Consequently, any confusion caused by the differing Complaints in *Brown* and *Gerald* should not have affected the scope of fact discovery in either case during this three year period. Technically, in *Brown*, Defendants should have conducted fact discovery with respect to the factual allegations and counts asserted in the original Complaint, the pleading with legal effect, until Plaintiff Brown was granted leave to file the proposed amended Complaints. It would appear, then, that Defendants would suffer greater prejudice as a result of the amendments in *Gerald*, where the fraud based claims were withdrawn, than in *Brown*, where the originally Complaint asserting the fraud based claims was not superseded by an amended Complaint during fact discovery.

However, the Court recognizes that the original Complaint in *Brown* remained in effect only because the Court neglected to rule on Plaintiff Brown's previous Motions for Leave to Amend the Complaint. In both cases, the original Complaints contained extensive factual allegations underlying the fraud based claims and both Plaintiffs sought leave to file amended

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[64] *Adams*, 2015 V.I. LEXIS 123, at *18-19 (V.I. Super. Ct. Oct. 6, 2015) (citing *Joseph*, 54 V.I. at 650).
[65] Essentially, Plaintiffs argue the scope of discovery in *Gerald* was guided by the contents of the original Complaint in *Brown*, while Defendants argue the scope discovery in *Brown* was defined by the more limited amended Complaint filed in *Gerald*.
[66] *See* August 8, 2014, Order (granting the parties' June 20, 2014, Joint Proposed Supplemental Scheduling Order and Motion for Pre-Trial Consolidation in the Gerald matter).

Complaints that removed the counts for the fraud based claims, but maintained some of the factual allegations underlying the fraud based claims. From the arguments and materials submitted, it appears that Defendants have expended significant time, effort, and resources in conducting discovery in *Brown* and *Gerald*, including taking depositions of numerous non-party fact witnesses and expert witnesses, and the Court acknowledges the possibility that Defendants may not have focused on the factual allegations underlying the fraud based claims due to the amendments previously sought by Plaintiffs.

To conclude that prejudice to Defendants precludes amendment in *Gerald*, but not *Brown*, merely because the Court fortuitously neglected to rule on Brown's Motions for Leave to Amend the Complaints, which in ordinary circumstances would be detrimental to the case, would elevate form over substance and violate the underlying policy governing amendments to pleadings. Consequently, because the original Complaints asserted factual allegations and causes of action for the fraud based claims and the amended Complaints proposed by Plaintiffs always retained some factual allegations underlying the fraud based claims, the Court finds that justice is better served by modifying the Scheduling Order and reopening fact and expert discovery, which will ameliorate the prejudicial effect caused by the amendments, rather than denying Plaintiffs the opportunity to amend their Complaints,

c. Undue Delay, Bad Faith, and Dilatory Motive.

Defendants argue that, despite the fact that Plaintiffs have been aware of the facts underlying the fraud based claims since they filed their original Complaints in 2010, Plaintiffs "offer no good faith, non-dilatory explanation" for failing to include the fraud based claims in Plaintiffs' "many prior motions to amend" or in waiting to bring their most recent Motions for

Leave to Amend their Complaints "on the eve of Defendants' expert disclosure deadline, nearly a year after the close of fact discovery, eight months after [Plaintiffs'] agreed-upon date for service of [Plaintiffs'] own expert records . . . , and two months after service of [Plaintiffs'] own expert reports that asserted various fraud-based allegations."[67] Defendants contend this demonstrates that "Plaintiffs simply waited to move [to amend] until a time most prejudicial to the defense: after Mr. England and Mrs. Brown ha[d] passed away and discovery had closed," which amounts to gamesmanship that is "the very embodiment of bad faith and dilatory motive."[68] In contrast, Plaintiffs argue there is no evidence of undue delay, bad faith, or dilatory motive because "Defendants have been on notice" of the fraud based claims since the commencement of litigation.[69]

"The passage of time, without more, does not require that a motion to amend a complaint be denied; however, at some point, the delay will become 'undue,' placing an unwarranted burden on the court[.]"[70] "Delay may . . . be 'undue' when, a movant has had previous opportunities to amend a complaint."[71] In arguing Plaintiffs' delay amounts to bad faith and dilatory motive so as to warrant the denial of leave to amend, Defendants cite the United States Court of Appeals for the Fifth Circuit's ruling in *Wimm v. Jack Eckerd Corp.*[72] In *Wimm*, the Fifth Circuit described circumstances in which delay in seeking leave amounts to bad faith and dilatory motive, as follows:

> [a party's] awareness of facts and failure to include them in the complaint might give rise to the inference that the [party] was engaging in tactical maneuvers to force the court to consider various theories seriatim. In such a case, where the

[67] Defs.' Opp'n. to Pls.' Mot. for Leave to Amend, p. 10.
[68] Defs.' Opp'n. to Pls.' Mot. for Leave to Amend, pp. 10-11.
[69] Pl. Gerald's November 9, 2015, Motion for Leave to file Amended Complaint, p. 4.
[70] *Pedro,* 2015 V.I. Supreme LEXIS 19, at *19-20 (Gomez, J., dissenting in part) (citations omitted).
[71] *Id.* at *20 (internal quotation marks omitted) (citations omitted).
[72] 3 F.3d 137, 141 (5th Cir. Tex. 1993); *See* Defs.' Opp'n. to Pls.' Mot. for Leave to Amend, p. 11.

> movant first presents a theory difficult to establish but favorable and, only after that fails, a less favorable theory, denial of leave to amend on the grounds of bad faith may be appropriate.[73]

In applying this rule, the Fifth Circuit in *Wimm* affirmed the district court's finding of bad faith and dilatory motive so as to warrant the denial of leave to amend because the record indicated that plaintiffs "were aware of the facts supporting . . . [certain claims] before they initiated th[e] action, but they did not present those claims until summary judgment was imminent, nine months after the action was initiated."[74]

Here, the Court does not find that undue delay, bad faith, and dilatory motive warrant the denial of Plaintiffs' Motions to Amend their Complaints. While Plaintiffs have admittedly had multiple opportunities to amend their Complaints, the Court does not find the November 9, 2015, amendments place an unwarranted burden on the Court because the Complaints have always contained some factual allegations underlying the fraud based claims. Similarly, unlike the circumstances in *Wimm*, where the plaintiffs were aware of the facts underlying the claims but failed to include them in their original pleading and then attempted to assert them as a tactical strategy to avoid dismissal of the suit on summary judgment, Plaintiffs here included factual allegations underlying the fraud based claims in all versions of the Complaint and asserted the individual counts for the fraud based claims in the original Complaints. Their inclusion put Defendants on notice of the fraud based claims since the commencement of this litigation and evince that Plaintiffs do not seek leave to reassert the individual counts for the fraud based claims

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[73] *Id.* (citing *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 596-600 (5th Cir.1981)).
[74] *Id.*

as a tactical maneuver. Consequently, the Court finds the record does not support a finding of bad faith or dilatory motive.

While the Court agrees with Defendants that some of "the specific allegations contained in Plaintiffs' proposed amendments . . . [are different, and more detailed, than those in Plaintiffs' [o]riginal Complaints,"[75] this does not warrant the denial of Plaintiffs' Motions for Leave to Amend their Complaints for undue delay, bad faith, and dilatory motive. As the Court concluded above, due to the unique circumstances at issue here, justice is best served by allowing Plaintiffs to amend their Complaints, while also modifying the Scheduling Order so that additional discovery may be conducted with respect to the allegations made in the amended Complaints.

d. Futility of the Amendments.

Defendants also argue that the amendments to the Complaints are futile to the extent they assert new, independent claims against Defendant R.J. Reynolds Tobacco Company, the successor-by-merger to claims previously asserted against Defendants Lorillard Tobacco Company and Lorillard Tobacco, Inc., because those claims are time-barred.[76] Defendants note that "[w]hile it appears that Plaintiffs' attempted assertion of independent claims against Reynolds was the result of careless draftsmanship, to the extent Plaintiffs did, in fact, intend to assert such claims, they should be denied as futile."[77] Plaintiffs contend that Defendants' argument is moot because Plaintiffs concede that they "do not seek to assert claims against R.J. Reynolds Tobacco

[75] Defs.' Opp'n. to Pls.' Mot. for Leave to Amend, pp. 7-8.
[76] Defs.' Opp'n. to Pls.' Mot. for Leave to Amend, p. 12.
[77] Defs.' Opp'n. to Pls.' Mot. for Leave to Amend, p. 12.

Company or any other Reynolds entity, other than in its capacity as a successor by merger to Lorillard Tobacco Company."[78]

Defendants are correct that amendment is futile if it is frivolous, would be barred by the statute of limitations, or would otherwise not survive a motion to dismiss.[79] However, because Plaintiffs have assured Defendants and the Court that Plaintiffs are not asserting independent claims against Defendant R.J. Reynolds Tobacco Company in its individual capacity, the Court agrees with Plaintiffs that this issue is indeed moot.[80] Should this issue subsequently arise, the Court cautions Plaintiffs that the interests of justice and the doctrine of judicial estoppel[81] will preclude Plaintiffs from contradicting their position.

CONCLUSION

In light of the foregoing, the Court concludes that, after applying the legal standard governing amendments to pleadings, different rulings on Plaintiffs' Motions for Leave to Amend their Complaints are not justified. Therefore, the Court will not alter or set aside the November 10, 2015, Orders because doing so is also not consonant with justice.

Notwithstanding, the Court cautions Plaintiffs that it is only due to the extraordinary circumstances, as discussed above, that the interests of justice warrant the granting of leave to amend their Complaints. The Court is cognizant of the additional effort, expenses, and resources Defendants may expend as a result of Plaintiffs reasserting the fraud based claims and that the

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[78] Pls.' Response to Defs.' Opp'n to Pls.' Mot. to Amend, p. 1.
[79] *Peters*, 58 V.I. at 54 (citing *Choate*, 19 V.I. at 407).
[80] *See Der Weer v. Hess Oil V.I. Corp.*, 2014 V.I. LEXIS 22, *11-13 (V.I. Super. Ct. 2014) ("A motion becomes moot when something occurs after a motion is filed that resolves the issues raised in that motion") (citations omitted).
[81] *See Fontaine v. People of the Virgin Islands*, 56 V.I. 571, 583 n. 7 (V.I. 2012); *Walters v. Walters*, 60 V.I. 768, 775 n. 7 (V.I. 2014); *New Hampshire v. Maine*, 532 U.S. 742, 749 (U.S. 2001).

amendments will undoubtedly further delay these already slow moving cases from reaching a trial on the merits. As a result, any future attempts by Plaintiffs to amend their Complaints will not be viewed favorably by the Court.

In order to reduce the prejudicial effect of the amendments, the Court finds modification of the Scheduling Order is necessary. Likewise, the Court finds that Defendants are entitled to an extension of time to answer, move, or otherwise plead in response to Plaintiffs' amended Complaints under Super. Ct. R. 10(a).

Accordingly, the Court will deny Defendants' Emergency Motion to Vacate, but grant Defendants' request for an extension of time to answer, move, or otherwise plead in response to Plaintiffs' amended Complaints, and direct the parties to submit a proposed amended Scheduling Order.

An Order consistent with this Memorandum Opinion shall follow.

Dated: April 25, 2016

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Estrella George
Acting Clerk of Court __/__/__

by: ________
Lori Boynes-Tyson
Court Clerk Supervisor 4/25/16