

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

VASHTI SHERROD	:	
EUGENE SHERROD,	:	
	:	
Plaintiffs,	:	Civil Action No. 16-816 (RC)
v.	:	
	:	
PHILLIP MCHUGH	:	
DISTRICT OF COLUMBIA	:	
DIANE LEE SCHULZ,	:	

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

Plaintiffs have moved the Court for leave to amend their complaint under Fed. R. Civ. P 15(a). The grounds supporting this motion are as follows.

Since the entry of the Scheduling Order on December 7, 2016, the parties and third-parties have produced hundreds of pages of documents bearing on issues of moment to this case. The document productions have revealed new facts and evidence that support Plaintiffs’ claims, more fully explained facts already known by Plaintiffs, and corrected misstatements of fact asserted in Plaintiffs’ original complaint (filed May 2, 2016) and Plaintiffs’ First Amended Complaint (filed June 14, 2016).

Plaintiffs now seek to amend their complaint to incorporate the facts, knowledge, and evidence gleaned from the documents that have been produced to date and to assert a negligence claim against Defendant Diane Lee Schulz.

Attached as Exhibit 1 is the proposed Second Amended Complaint, which contains double underlined text to denote the text that was changed from, or added to, the First Amended Complaint. The proposed Second Amended Complaint in its final form is attached as Exhibit 2.

“Rule 15(a) declares that leave to amend ‘shall be freely given when justice so requires’; this mandate is to be heeded.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). “If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be ‘freely given.’” *Id.*

Defendants will not be unfairly prejudiced by the pleading amendments sought by Plaintiffs. First, Plaintiffs’ motion is timely, as the discovery period has only recently opened, the parties’ depositions have not yet occurred, and the deadline for Plaintiffs’ provision of their expert reports (March 16, 2017) has not passed. Second, most of the revisions to Plaintiffs’ pleading are minor and inconsequential. Third, the new negligence count against Defendant Schulz (Count Seventeen) is well pled, timely filed within the applicable three-year statute

of limitations for such common law claims (D.C. Code § 12–301(8) (2001)), and certainly cannot fairly be deemed futile by Defendant Schulz.¹ Finally, there is no basis for Defendants to aver that Plaintiffs’ pleading amendments are made in “bad faith” or with a “dilatory motive;” nor have Plaintiffs “fail[ed] to cure deficiencies by amendments previously allowed.”

CONCLUSION

For the foregoing reasons, the court should grant Plaintiffs leave to file their Second Amended Complaint. A proposed order follows.

Respectfully submitted,

/s/ Kenneth D. Bynum

Kenneth D. Bynum [424515]

Bynum & Jenkins

1010 Cameron Street

Alexandria, VA 22314

T: (703) 549-7211

E: kbynum@bynumandjenkinslaw.com

/s/ Peter T. Enslein

Peter T. Enslein [367467]

Law Offices of Peter T. Enslein, P.C.

1738 Wisconsin Avenue, NW

Washington, DC 20007

T: (202) 329-9949

F: (202) 625-3490

E: peter@ensleinlaw.com

Attorneys for Plaintiffs

¹ “‘Futility’ means that the proposed new claim cannot withstand a 12(b)(6) [motion to dismiss] if it appears beyond doubt that plaintiff can plead no set of facts that would entitle him to relief.” *E*Trade Fin. Corp. v. Deutsche Bank AG*, 420 F. Supp. 2d 273, 283 (S.D.N.Y. 2006) (internal citation omitted).

CERTIFICATE OF SERVICE

I certify that on February 8, 2017, I served a copy of the foregoing *via* the CM/ECF system on:

David A. Jackson, Esq.
Office of Attorney General of the District of Columbia
441 Fourth Street, NW, 6th Floor North
Washington, DC 20001
Attorney for Defendants District of Columbia and Phillip McHugh

David F. Grimaldi, Esq.
Martell, Donnelly, Grimaldi & Gallagher, PA
1900 L Street, NW, Suite 703
Washington, DC 20037
Attorney for Defendant Diane Lee Schulz

/s/ Peter T. Enslein
Peter T. Enslein