IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEPAGE'S INCORPORATED,	:	CIVIL ACTION
Plaintiff	:	
v.	:	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	:	
Defendant	:	No. 97-3983

M E M O R A N D U M

Padova, J. August , 1998

Before the Court are two closely related Motions in this case. Defendant filed a Motion for Partial Summary Judgment on the ground that the named Plaintiff has no standing to assert some of the claims in its Amended Complaint, having assigned them to another company. Plaintiff thereafter filed a Motion for Leave to File a Second Amended Complaint and add the company to which it had assigned the claims. The Court will grant Plaintiff's Motion for Leave to File a Second Amended Complaint and will deny Defendant's Motion for Partial Summary Judgment.

I. BACKGROUND

LePage's Incorporated ("LePage's") brought this suit against Defendant, Minnesota Mining and Manufacturing Company ("3M"), alleging that Defendant has monopolized or attempted to monopolize the market for invisible and transparent home and office tape by engaging in a variety of anticompetitive practices in violation of antitrust laws. In its Motion for Partial Summary Judgment, 3M contends that LePage's does not have

standing to assert antitrust claims against it. On March 31, 1997, as part of a complex corporate restructuring, LePage's sold and assigned all of its rights in any cause of action against "competitors of the Company in respect of anti-competitive practices in which such competitors may have engaged against the Company" on March 31, 1997. (Mem. Supp. Mot. Summ. J. at 1 & Ex. A., Restructuring Agreement ("Restructuring Agreement") Art. I; Ex. B, Assignment.) 3M further states that the restructuring was brought on by LePage's default on debt incurred as a result of a leveraged buyout in 1993, and it resulted in the forgiving of $30,000,000 of indebtedness incurred by LePage's and its parent, LePage's Industries, Inc. The assignee of the rights is a newly formed limited liability corporation, LePage's Management Company, L.L.C. ("LePage's Management), in which LePage's has no interest. (Mem. Supp. Mot. Summ. J. at 1-2, 5-6). 3M asserts that as a result of this assignment, the named Plaintiff in this case, LePage's, cannot sue on its antitrust claims.[1] Therefore, it argues, any such claims arising on or before March 31, 1997, must be dismissed and partial summary judgment granted as to them.

The day after 3M filed its Motion for Partial Summary Judgment, LePage's filed its Motion for Leave to File a Second

[1]Because LePage's assigned its rights to the antitrust cause of action to LePage's Management Company without expressly reserving its right to prosecute the claim itself, it cannot now bring suit on those claims. See Indian Coffee Corp. v. Procter & Gamble Co., 752 F.2d 891, 893-93 (3d Cir. 1985).

Amended Complaint, adding LePage's Management as a Plaintiff. LePage's does not dispute 3M's contention that it is not the real party in interest with respect to the anti-trust claims. Instead, it asserts that both LePage's and LePage's Management are both real parties in interest -- LePage's with respect to injunctive relief and LePage's Management with respect to monetary damages.

II. LEGAL STANDARD

The decision whether to grant or deny a motion for leave to amend is within the sound discretion of the district court. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997). Federal Rule of Civil Procedure 15(a) provides that, after a responsive pleading is served, "a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). The United States Supreme Court has set out the standard for determining whether to grant leave to amend under Rule 15(a) in Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227 (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." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. at 182, 83 S. Ct. at 230. In interpreting the factors set out in Foman, the United States Court of Appeals for the Third Circuit ("Third Circuit") has stated that "prejudice to the non-moving party is the touchstone for the denial of an amendment." Lorenz v. CSX Corp., 1 F.3d 1408, 1414 (3d Cir. 1993) (internal quotations and citations omitted).

With respect to bringing a real party in interest into the case, Federal Rule of Civil Procedure 17(a) provides:

> Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Fed.R.Civ.P. 17(a).

III. DISCUSSION

3M argues that LePage's Motion should be denied because of undue delay, bad faith and dilatory motive, failure to cure known deficiencies in earlier pleadings, and severe prejudice. The Court will discuss each of these objections, examining prejudice first because "prejudice to the non-moving party is the

touchstone for the denial of an amendment." Lorenz v. CSX Corp., 1 F.3d at 1414.

A. Undue Prejudice

3M contends that it will be prejudiced in two ways if the proposed amendment is allowed. First, 3M claims it will be prejudiced by a jury trial. It argues that "this case, as it stands today, is not one triable to a jury. The only plaintiff in the case, LePage's, has no damages claim; its only claim, for injunctive relief, is triable only to the Court." (Deft.'s Resp. at 10.) 3M claims that allowing the case to go to a jury will require additional work both in preparing for trial and in trying a jury case. In addition, 3M refers to "the well known propensity of juries to 'get it wrong' in antitrust cases and, in fact, chill legitimate competition." (Id.) It argues that LePage's "should not be permitted to take what is and always has been a non-jury case and turn it into a jury case by adding as a party-plaintiff an entity that has only a jury claim." (Id.) Second, 3M contends it will be prejudiced in that it will need additional discovery time to take the depositions of LePage's Management Company, but there is no time because discovery is now closed.

The Court is not persuaded that 3M has demonstrated it would suffer prejudice as a result of the proposed amendment.

"Prejudice does not mean inconvenience to a party. Moreover, it is obvious that an amendment designed to strengthen the movant's legal position, will in some way harm the opponent." Cuffy v. Getty Refining & Marketing Co., 648 F. Supp. 802, 806 (D. Del. 1986). In addition, "[a] mere claim of prejudice is not sufficient; there must be some showing that [3M] was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." Dole v. Arco Chemical Co., 921 F.2d 484, 488 (3d Cir. 1990) (internal quotations and citation omitted). "In order to make the required showing of prejudice, regardless of the stage of the proceedings, [3M] is required to demonstrate that its ability to present its case would be seriously impaired were amendment allowed." Id.

> The necessity for defendant to conduct further discovery . . . is not sufficient to show prejudice. See Goodman v. Mead Johnson & Co., 534 F.2d 566, 569 (3d Cir. 1976) (necessity of further discovery not sufficient prejudice to bar amendment alleging claim arising from the same transaction). Similarly, the fact that the motion to amend was made after the motion for partial summary judgment does not require denying the plaintiff's motion. See Artman v. International Harvester Co., 355 F. Supp. 476, 481 (W.D. Pa. 1972) (granting plaintiff's motion to amend after hearing on defendant's summary judgment motion); . . .

Cuffy, 648 F. Supp. at 806.

3M is in no worse position than it would have been had LePage's amendment been made earlier in the litigation. See Dole, 921 F.2d at 488. LePage's merely proposes to add the real party in interest for one of the claims which it had asserted and

for which 3M has prepared. LePage's argues that little, if any, additional discovery should be needed because the new Plaintiff will be asserting the exact same claim that LePage's has asserted. However, even if the Court finds that some discovery is needed as a result of the addition of LePage's Management Company to the case, that is not a basis for finding prejudice. Cuffy, 648 F. Supp. at 806; National Media Securities Litigation, No. 93-2977, 1994 WL 649261, at *3 (E.D. Pa. Nov. 18, 1994). Upon timely application, the Court will consider giving 3M additional time for discovery relating to the newly named Plaintiff.

In referring to what it calls the “well known propensity of juries to 'get it wrong' in antitrust cases,” 3M cites two cases, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593-94, 106 S. Ct. 1348, 1359 (1986) and Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1197 (3d Cir. 1995). Both of those cases were approving district courts' decisions to grant summary judgment on the merits in antitrust cases and warning of the dangers of “permit[ting] factfinders to infer conspiracies when such inferences are implausible.” Matsushita, 475 U.S. at 593, 106 S. Ct. at 1359; Advo, 51 F.3d at 1197 (quoting Matsushita, 475 U.S. at 593, 106 S. Ct. at 1359. Neither suggested that antitrust cases should not be scheduled for jury trial or should not be allowed to proceed to a jury trial where there are genuine differences of material fact.

Because the Court does not find that 3M will suffer prejudice as a result of LePage's proposed amendment, it must now turn to the other factors in the analysis to determine whether they, standing alone, are sufficient grounds for denying LePage's Motion for Leave to Amend.

B. Undue Delay

The party seeking leave to amend bears the burden of explaining the reasons for the delay. Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72 (2d Cir. 1990). In this case, 3M notes that LePage's has given no reason for its delay in adding LePage's Management Company, and it is clear that the proposed amendment is not based on oversight, mistake, or newly discovered information. In fact, the failure to amend earlier has no obvious explanation other than as a strategic decision. 3M states that courts have routinely denied motions to amend where the plaintiff knew, or should have known, of the facts contained in the proposed amendment. However, the cases it cites involved something more than mere delay. See, e.g., Piazza v. Major League Baseball, No. 92-7173, 1994 WL 385062 (E.D. Pa. July 19, 1994) (denying leave to amend where delay was undue and amendment "would prejudice Defendants by significantly altering the claims pursued in the litigation."); DRR, L.C.C. v. Sears, Roebuck and Co., 171 F.R.D. 162 (D. Del. 1997) (denying leave to amend where delay was undue and plaintiff failed to assert negligent

misrepresentation until after court had granted summary judgment in favor of defendant). In addition, as this Court has stated,

> Delay alone . . . is not a sufficient reason for denying leave to amend. See Kiser v. General Elec. Corp., 831 F.2d 423, 427 (3d Cir. 1987) . . . . "The delay, to become a legal ground for denying a motion to amend, must result in prejudice to the party opposing the amendment, and it is the opposing party's burden to prove that such prejudice will occur." Id. at 427-28.

DiBiase v. SmithKline Beecham Corp., No. 93-3171, 1994 WL 85680, at * 1 (E.D. Pa. March 17, 1994) (rev'd on other grounds, 48 F.3d 719 (3d Cir. 1995). The Court has concluded that 3M will suffer no undue prejudice as a result of the proposed amendment to add a real party in interest and therefore will not deny LePage's Motion to Amend on the basis of delay.

C. Bad Faith and Dilatory Motive

3M contends that it is evident that LePage's Motion to Amend is based on bad faith and dilatory motive for a number of reasons: first, LePage's filed antitrust claims in its own name knowing that it had no right to do so; second, LePage's falsely pleaded in the Complaint that it was at the time of filing "in a position of insolvency," whereas the restructuring agreement had rendered LePage's financially solvent; third, both LePage's and LePage's Management Company withheld the restructuring agreement in discovery; and fourth, the timing of the Motion suggests it was meant to sidestep 3M's Motion for Partial Summary Judgment. LePage's denies that it withheld information of the restructuring

agreement in discovery and makes no comment in response to the other allegations.

3M further contends that it would be a misuse of Rule 17 to allow LePage's to use it to add LePage's Management Company as a Plaintiff. It quotes the Advisory Committee Notes to Rule 17, which state that the provision in the rule allowing a real party in interest to be joined or substituted "is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." Fed.R.Civ.P. 17, Advisory Committee Notes, 1966 Amendment. 3M points out that neither of these circumstances is present here. LePage's does not claim mistake or difficulty of determination in the omission of LePage's Management Company from the original Complaint. Nor would LePage's Management Company have to forfeit its claims if the Motion were denied. However, even if it considered itself bound by the Advisory Committee Notes and concluded that the Motion to Amend did not satisfy the requirements of Rule 17, the Court would not deny the Motion; instead, it would grant the Motion under Rule 15 alone. Denying the Motion would merely mean that LePage's Management Company would have to sue separately and that, instead of one suit, there would be two suits arising out the same transactions. That would be an inefficient use of judicial resources.

A court may justify the denial of a motion to amend on grounds of bad faith and dilatory motive. Foman, 371 U.S. at 182, 83 S. Ct. at 230. In this case, there is an insufficient

basis for the Court to conclude that LePage's acted in bad faith. However, even if it were to conclude that LePage's motives in failing to amend earlier were questionable, it would still allow the amendment because there is no undue prejudice and because the amendment serves the interests of judicial efficiency. Furthermore, courts have a variety of ways in which to respond to bad faith conduct, and if the Court were convinced that LePage's had acted in bad faith, it could respond in ways that would not result in judicial inefficiency.

D. Failure to Cure Previously Known Deficiencies in Earlier Pleadings

3M asserts that when LePage's filed the original Complaint and the First Amended Complaint, it knew that the pleadings were deficient in the way it seeks to correct by its present Motion. It states that LePage's failure to cure previously known deficiencies in those Complaints is a factor to be considered when ruling on the Motion for Leave to Amend. 3M cites Robert Billet Promotions, No. 95-1376, 1997 WL 827063, at *2 (E.D. Pa. Nov. 19, 1997), in which the court denied the plaintiff's motion for leave to add, after two and one-half years of litigation, a claim that it could have added to its complaint or amended complaint. However, in that case, unlike this one, the court found that allowing the amendment would cause the defendants undue prejudice. Id. The Court has considered the fact that LePage's could have added LePage's Management Company earlier, and concludes that it is outweighed by other factors.

IV CONCLUSION

For reasons stated above, the Court will grant Plaintiff's Motion for Leave to Amend and will Deny Defendant's Motion for Partial Summary Judgment.

An appropriate Order follows.

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Defendant	:	No. 97-3983

O R D E R

AND NOW, this day of August, 1998, upon consideration of: (1) Plaintiff's Motion for Leave to File a Second Amended Complaint (Doc. No. 68), Defendant's Memorandum in Opposition (Doc. No. 71) and Plaintiff's Reply (Doc. No. 77); and (2) Defendant's Motion for Partial Summary Judgment (Doc. No. 64), Plaintiff's Response (Doc. No. 70), and Defendant's Reply (Doc. No. 73), **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion for Leave to File a Second Amended Complaint (Doc. No. 68)is **GRANTED,** and the Clerk of Court shall docket the Second Amended Complaint attached to Plaintiff's Motion; and

2. Defendant's Motion for Partial Summary Judgment (Doc. No. 64) is **DENIED AS MOOT**.

BY THE COURT:

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John R. Padova, J.