

STANDARD OF REVIEW

Leave to amend a complaint should be freely granted “when justice so requires.” Fed. R. Civ. P. 15(a)(2). While the Court is given the discretion to deny the motion to amend, “that discretion is limited by the interpretation given Rule 15(a) in *Foman [v. Davis]*, 371 U.S. 178 (1962)], ‘and by the general policy embodied in the Federal Rules favoring resolution of cases on their merits.’” *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987) (citation omitted). Upholding the letter and the spirit of this rule, “leave to amend a pleading should be denied *only when* the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999), quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986) (emphasis in original). A delay in bringing a proposed amendment is insufficient reason to deny leave to amend. *Edwards v. Goldsboro*, 178 F.3d at 242.

For a motion to amend to be denied for futility, the amendment must be “clearly insufficient or frivolous on its face.” *Johnson v. Oroweat Foods Co.*, 785 F.2d at 510-511.

I. The Amendment Will Not Be Prejudicial To Defendant, and There Has Been No Bad Faith on the Part of the Moving Party.

There is no basis for an argument that the amendment will be prejudicial to the Defendant. While the proposed Second Amended Complaint adds new constitutional claims to this action, the addition of new theories of recovery is insufficient reason to disallow amendment. *Robinson v. GEO Licensing, L.L.C.*, 173 F. Supp. 2d 419, 426 (D. Md. 2001); *Fed. Leasing v. Amperif Corp.*, 840 F. Supp. 1068, 1072 (D. Md. 1993). While “[i]t is true that prejudice can result where a proposed amendment raises a new legal theory . . . that basis for a finding of prejudice essentially applies where the amendment is offered shortly before or during trial.” *Johnson v. Oroweat Foods Co.*, 785 F.2d at 510.

In the context of a motion for leave to amend, “[p]rejudice means that the non-moving party 'must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely.'” *Cuffy v. Getty Ref. & Mktg. Co.*, 648 F. Supp. 802, 806 (D. Del. 1986) (citation omitted); *accord*, *Robinson v. GEO Licensing, L.L.C.*, 173 F. Supp. 2d at 426. As this case is in the preliminary motion stage and discovery has not yet even commenced, Defendant cannot show any such unfair disadvantage or deprivation of opportunity.

Nor is there any support for an argument that the moving parties are guilty of bad faith. The amendments in question are made entirely in good

faith on the basis of rapidly moving events, including the recent and ongoing actions of the leadership of the House of Representatives in seeking to secure passage of the Senate Bill through the House of Representatives, all of which have occurred since the filing of the original and First Amended Complaints.

In short, leave to amend cannot be denied on the basis of either prejudice to the Defendant or bad faith on the part of the moving parties.

II. The New Constitutional Claims Set Forth in the Proposed Amendment Are Not Futile.

The proposed amendment is neither clearly insufficient nor frivolous on its face. The proposed Second Amended Complaint sets forth two additional constitutional claims involving the same Senate Bill that is the subject of the original constitutional claims asserted against the Defendant President.

The claim set forth in Count III of the proposed Second Amended Complaint is based on the Origination Clause. The Origination Clause mandates that “[a]ll bills for raising Revenue shall originate in the House of Representatives.” U.S. Const., Art. I, § 7, cl. 1; *see United States v. Munoz-Flores*, 495 U.S. 385, 387 (1990). As the Supreme Court elaborated in *Munoz-Flores*,

In the case of "Bills for raising Revenue," § 7 requires that they originate in the House before they can be properly passed by the two Houses and presented to the President. The Origination Clause is no less a requirement than the rest of [Section 7] because ‘it does not specify what consequences follow from an improper origination,’

post, at 402. None of the Constitution's commands explicitly sets out a remedy for its violation. Nevertheless, the principle that the courts will strike down a law when Congress has passed it in violation of such a command has been well settled for almost two centuries. *See, e.g., Marbury v. Madison*, 1 Cranch 137, 176-180 (1803). That principle applies whether or not the constitutional provision expressly describes the effects that follow from its violation.

495 U.S. at 396-397.

The bill in question, moreover, is one for “raising Revenue.” Thus, the Senate Bill raises revenue through the imposition of taxes, fees, and limits on deductions, including, but not limited to, a tax on cosmetic surgery, higher payroll taxes on top earners, a tax on high end, “luxury” health insurance plans, the imposition of fees on health insurance companies, the imposition of fees on drug manufacturers, the imposition of fees on the manufacturers of medical devices, the setting of a higher floor for deducting medical expenses, and the imposition of a cap on flexible health spending accounts. Furthermore, the health care subsidies and programs financed by these taxes will benefit groups of citizens who are “entirely unrelated to the persons paying for the program[s].” *See United States v. Munoz-Florez*, 495 U.S. at 400 n. 7 (not reaching question “[w]hether a bill would be ‘for raising Revenue’ where the connection between payor and program was more attenuated . . .”).

Secondly, the bill in question, The Patient Protection and Affordable Care Act (H.R. 3590), hereinafter “the Senate Bill,” is a Senate health care reform bill

that was initiated in the Senate by being introduced on the floor of the Senate on November 18, 2009. Consequently, passage of this revenue-raising bill by the House of Representatives fails to meet the requirements of the Origination Clause and would render any resulting law subject to being struck down as null and void.

The claim set forth in Count IV of the proposed Second Amended Complaint is based on the requirement of Article I, Section 7 of the Constitution that, in order for a bill to “become a law,” the exact same bill with the exact same text must be approved by both the House and the Senate before the that text is presented to the President to be signed. *See* U.S. Const. Art. I, § 7; *Clinton v. City of New York*, 524 U.S. 417, 448 (1998). Voting on a companion reconciliation or sidecar bill, containing a package of amendments to the Senate Bill, which vote is then “deemed” by a House rule to constitute passage of the Senate Bill itself, is not a vote on the exact same bill and the exact same text as the bill that the Senate voted on, and would violate the requirements of Article I, Section 7 of the Constitution for when a bill can “become a law.”

In short, the new claims asserted in the proposed amendment are neither clearly insufficient nor frivolous. Thus, leave to amend should not be denied on the grounds of futility, and the substantive merits of the proposed additional claims should be left for later resolution, e.g., under motions to dismiss or for summary judgment or at trial. *See Rambus v. Infineon Techs. AG*, 304 F. Supp. 2d 812, 819

(E.D. Va. 2004).

CONCLUSION

In view of the arguments made and authorities cited above, Plaintiffs respectfully request that their Motion for Leave to File Second Amended Complaint be granted.

Respectfully submitted,

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