UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CAPITOL BODY SHOP, INC., *et al.*,

Plaintiffs,

v.

Case No. 6:14-CV-06000-ORL-31TBS

STATE FARM MUTUAL AUTO INSURANCE COMPANY, *et al.*,

Defendants.

DEFENDANTS GEICO GENERAL INSURANCE COMPANY, GEICO INDEMNITY COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY AND NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER

Plaintiffs' Motion to Reconsider (Doc. 120), which is really a motion for leave to file a Third Amended Complaint, should be denied. In dismissing Plaintiffs' antitrust claims with prejudice, the Court was correct to conclude that: (1) Plaintiffs' Second Amended Complaint ("SAC") failed to state a claim that GEICO General Insurance Company and GEICO Indemnity Company (collectively "GEICO"), and Nationwide Mutual Insurance Company and Nationwide Property and Casualty Insurance Company (collectively "Nationwide") engaged in price-fixing or boycotting in violation of Section 1 of the Sherman Act; and (2) Plaintiffs have had ample opportunity to state an antitrust claim against GEICO and Nationwide and giving them another opportunity "would be an exercise in futility." Doc. 116 at 18.[1] Plaintiffs' Motion to Reconsider provides no basis for this Court to reconsider either of those conclusions and the Court should not do so.

Plaintiffs' Motion to Reconsider does not argue the SAC states a claim, conceding it does not. Instead, Plaintiffs argue the Court should reconsider the dismissal of their antitrust claims because of the purported "availability of new evidence." The "new evidence," however, is not evidence. Rather, Plaintiffs vaguely discuss two additional allegations they apparently would like to include in a Third Amended Complaint. As the Court already predicted, permitting Plaintiffs to amend their complaint to add allegations would be an exercise in futility. These additional allegations say nothing about GEICO, Nationwide, or any conspiracy to fix prices. The Court should not grant Plaintiffs leave to file a Third Amended Complaint.

The Court should not reconsider its dismissal of Plaintiffs' antitrust claims based on these additional allegations either. Plaintiffs' Motion to Reconsider includes no evidence, new or otherwise, and provides no basis for the Court to conclude that new evidence exists. Plaintiffs' additional allegations are not evidence – certainly they are not admissible or credible – as required for the Court to reconsider its Order. The Court should also deny Plaintiffs' Motion to

[1] The Court's February 22, 2016 Order dismissing Counts I and II, after lengthy analysis of Plaintiffs' allegations in support of those claims, contains no indication that it was issued in "haste" and Plaintiffs provide no reason for the Court to have to wait to dismiss their insufficient antitrust claims until Plaintiffs' objection to Judge Smith's Report and Recommendation regarding the state law claims is resolved. *Compare* Doc. 116 (analyzing Plaintiffs' antitrust allegations) *with* Doc. 120 ¶ 2-3 (asserting that the Order was issued in haste).

Reconsider because Plaintiffs have known of these allegations for nearly a year without taking any action, wasting the Court's time and resources in the interim.

I. PLAINTIFFS SHOULD NOT BE GRANTED LEAVE TO AMEND THEIR COMPLAINT A THIRD TIME

Although Plaintiffs style their motion as one for reconsideration, they actually request leave to file another amended complaint. *See* Doc. 120 ¶ 11 (asking the Court to reconsider its Order and grant them leave to file an amended complaint). Assuming *arguendo* that the Court treats this Motion to Reconsider as a motion for leave to amend, such a recast motion fails because the amendment still fails to state a claim and because Plaintiffs unduly delayed bringing these purported new allegations to the Court's attention.

"The decision whether to grant leave to amend is within the sound discretion of the trial court." *Jameson v. Arrow Co.*, 75 F.3d 1528, 1534 (11th Cir. 1996) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). A motion for leave to amend is not appropriate where "the court has clearly indicated [ ] that no amendment is possible" as the Court has done here. *Freeman v. Rice*, 399 F. App'x 540, 544 (11th Cir. 2010) (unpublished) (citing *Czeremcha v. Int'l Ass'n of Machinists & Aerospace Workers, AFL–CIO*, 724 F.2d 1552, 1556 n.6 (11th Cir. 1984)); *see also Streambend Properties II, LLC v. Ivy Tower Minneapolis, LLC*, 781 F.3d 1003, 1010 (8th Cir. 2015) ("When a party moves to amend a complaint after dismissal, a more restrictive standard reflecting interests of finality applies.").

Although Federal Rule of Civil Procedure 15(a) provides that courts should freely grant leave to amend pleadings "when justice so requires," leave to amend may be denied based on "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, [and] futility of the amendment." *Foman*, 371 U.S. at 182. Leave to amend may be denied for futility "when the complaint as amended is still subject to dismissal." *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999) (citation omitted).

Plaintiffs claim to have "obtained a statement from a Progressive employee" and to have "obtained a statement from a State Farm representative" that they declare are "explicit admissions of price fixing." Doc. 120 ¶¶ 5-7. Even if Plaintiffs added the allegations in Paragraphs 5 and 6 of their Motion to Reconsider to the SAC, the proposed Third Amended Complaint would still fail to state a claim that GEICO or Nationwide (or any Defendant) knew about or participated in a price-fixing conspiracy.

The general statement that "insurance companies 'get together at big meetings' to set body shop labor rates, and that the insurance companies uniformly apply the labor rates agreed upon at these meetings" allegedly made by a Progressive employee does not mention GEICO, Nationwide (or any Defendant) or Mississippi. *See* Doc. 120 ¶ 5. To state a claim that GEICO or Nationwide joined a purported conspiracy, Plaintiffs ask the Court to assume the employee was talking about GEICO, Nationwide and Mississippi. The Court cannot assume unalleged facts. *Linville v. Ginn Real Estate Co., LLC*, 697 F. Supp. 2d 1302, 1306 (M.D. Fla. 2010) (citing *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983)).

Plaintiffs allege the unnamed Progressive employee "even identified when the next such meeting was going to occur." Doc. 120 ¶ 5. This is similar to the allegation in the First Amended Complaint in *Legends Collision Center, LLC v. State Farm Mutual Automobile Insurance Company* that "new rates would likely be determined at a 'big meeting' that was scheduled in April 2015." *See* Case No. 6:14-cv-06006-GAP-TBS, Doc. 93, ¶ 214 (September 18, 2015). Even if the Court could assume GEICO or Nationwide was one of the unnamed insurance companies, this alleged statement, even if true, does not allege facts plausibly suggesting GEICO or Nationwide engaged in a price-fixing conspiracy. April 2015 passed nearly a year ago, but Plaintiffs' Motion to Reconsider does not allege a meeting actually occurred, GEICO, Nationwide or any other Defendant attended a meeting, GEICO or Nationwide agreed to anything with any other Defendant or with each other, or that GEICO or

Nationwide took any action pursuant to an agreement reached at any meeting.[2] Nor do Plaintiffs offer facts to support these conclusions about any other meeting.

The purported statements from the "State Farm representative" are equally immaterial. *See* Doc. 120 ¶ 6. All the State Farm representative allegedly said is something this Court already assumed when dismissing the antitrust claims in the SAC: "that State Farm manipulates or fakes the survey results, producing bogus 'market rates' that are below the rates actually prevailing in the marketplace." *See* Doc. 116 at 5. The Court already considered and rejected a similar allegation in *Brewer Body Shop, LLC v. State Farm Mutual Automobile Insurance Company*. *See* Case No. 6:14-cv-06002-GAP-TBS, Doc. 85, ¶ 151 (May 18, 2015) ("A State Farm employee has admitted to Plaintiff ICON that State Farm deliberately suppresses labor rates and the purported survey results in a 'prevailing competitive price' is actually 'whatever State Farm wants it to be.' This employee has further admitted State Farm purposefully asserts reliance upon out-of-date information, such as labor rates 'about twenty years old,' entered into the 'survey' long ago."); *id.* at Doc. 106 at 12 n.5 (discussing this allegation in dismissing the antitrust claims). The Court was correct to conclude this allegation does not assist Plaintiffs in stating a claim against GEICO or Nationwide.

Nothing in Plaintiffs' allegations about a Progressive employee and a State Farm representative justify this Court rethinking its conclusion that further amendment "would be an exercise in futility." *See* Doc. 116 at 18. Indeed, the Motion to Reconsider confirms this conclusion. The Court should not grant Plaintiffs leave to file yet another futile complaint.

II. PLAINTIFFS' MOTION TO RECONSIDER MUST BE DENIED BECAUSE PLAINTIFFS DID NOT PRESENT NEW EVIDENCE

Even if Plaintiffs' request for leave to amend was not futile, they have provided no valid basis for the Court to reconsider its dismissal Order. The Eleventh Circuit has been clear that

[2] Because Plaintiffs "must either attach a copy of the proposed amendment to the motion or set forth the substance thereof," the Court should conclude that Paragraphs 5 and 6 of Plaintiffs' Motion to Reconsider contain the entire substance of any proposed amendments and should not assume Plaintiffs would include additional factual allegations, or permit them to do so. *See U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1362 (11th Cir. 2006) (citing *Long v. Satz*, 181 F.3d 1275 (11th Cir.1999)); *see id.* (quoting *Wisdom v. First Midwest Bank*, 167 F.3d 402, 409 (8th Cir. 1999) ("[A] plaintiff 'should not be allowed to amend [his] complaint without showing how the complaint could be amended to save the meritless claim.'")).

"[t]o prevail on a motion for reconsideration, the moving party must present new facts or law of a strongly convincing nature." *Slomcenski v. Citibank, N.A.*, 432 F.3d 1271, 1276, n.2 (11th Cir. 2005). When seeking reconsideration based on the discovery of new evidence, as Plaintiffs do here, ***the newly discovered evidence must be both admissible and credible***. *Provident Life & Acc. Ins. Co. v. Goel*, 274 F.3d 984, 1000 (5th Cir. 2001) ("Additionally, commentators have described as 'self-evident' the requirements that newly discovered evidence be 'both admissible and credible' . . . .") (quoting 11 James Wm. Moore *et al.*, Moore's Federal Practice ¶ 60.42[6] (3d ed. 1997)); *see also, e.g.*, *Goldstein v. MCI WorldCom*, 340 F.3d 238, 257 (5th Cir. 2003); *F.D.I.C. v. Arciero*, 741 F.3d 1111, 1118 (10th Cir. 2013).

Instead of offering *evidence* that the statements they allegedly "obtained" from a Progressive employee and State Farm representative were made, however, Plaintiffs merely offer allegation. *See* Black's Law Dictionary 86 (9th ed. 2009) (defining "allegation" as "[t]he act of declaring something to be true" and "[s]omething declared or asserted as a matter of fact, esp. in a legal pleading; a party's formal statement of a factual matter as being true or provable, without its having yet been proved"). Plaintiffs provide no sworn statement. They do not even provide the names of the employee and representative who purportedly made these statements, the names of the people to whom the statements were made, where the statements were made, when the statements were made, the circumstances under which the statements were "obtained," or even the content of the statements.

In addition, neither of these statements are *admissions by* GEICO or Nationwide, nor would they be *admissible against* GEICO or Nationwide. The new allegations say nothing about GEICO or Nationwide knowing about or joining a conspiracy and, even if these alleged statements were made, they would be inadmissible hearsay as to GEICO and Nationwide. *See* Fed. R. Evid. 801, 802.

Nor do Plaintiffs provide any basis for the Court to conclude that their new allegations are credible. Without a sworn statement, the names of the speakers or witnesses to the statements, the content or context of the statements, the Court has no means by which to

determine whether the statements were made or if the speaker has any actual knowledge of the content of the statements (setting aside that the alleged statements say nothing about GEICO or Nationwide).

Plaintiffs may claim that their antitrust claims are only at the pleading stage (they are not, they have been dismissed), so the Court should not require them to produce evidence or weigh the credibility of their allegations to survive a Rule 12(b)(6) motion to dismiss. Plaintiffs, however, are no longer trying to survive a Rule 12(b)(6) motion to dismiss based on the allegations contained in some proposed Third Amended Complaint. Instead, Plaintiffs are seeking to re-instate claims this Court has already dismissed because they have declared they have "newly discovered evidence." The law requires that if Plaintiffs want this Court to re-instate claims based on new evidence, they must present evidence that is both admissible and credible. Plaintiffs have done nothing but offer allegations and their Motion to Reconsider must, therefore, be denied.

III. THE COURT SHOULD ALSO DENY RECONSIDERATION BECAUSE PLAINTIFFS DELAYED IN OFFERING THESE "NEW" ALLEGATIONS

"A district court's denial of reconsideration is especially soundly exercised when the party has failed to articulate any reason for the failure to raise an issue at an earlier stage in the litigation." *Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990) (citing *Van Ryn v. Korean Air Lines*, 640 F. Supp. 284, 286 (C.D.Ca. 1985)). "A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim." *Union Planters Nat'l Leasing v. Woods*, 687 F.2d 117, 121 (5th Cir. 1982) (quoting *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469 (5th Cir. 1967)).

Plaintiffs claim that "[n]either of these [alleged] statements existed at the time the complaint was amended." Doc. 120 ¶ 7. Because Plaintiffs do not provide the dates either of the alleged statements were made, the Court has no basis to conclude this claim is true. Regardless, Plaintiffs knew about these allegations long before the Court dismissed the SAC. A similar allegation about a State Farm employee was made on May 18, 2015 in *Brewer Body Shop*.

Compare Case No. 6:14-cv-06002-GAP-TBS, Doc. 85, ¶ 151 *with* Doc. 120 ¶ 6. A similar allegation about a Progressive representative was made on September 18, 2015 in *Legends Collision Center*. *Compare* Case No. 6:14-cv-06006-GAP-TBS, Doc. 93, ¶ 214 *with* Doc. 120 ¶ 5. The *Legends* plaintiffs alleged that the Progressive employee said the next "big meeting" was scheduled in April 2015, meaning it had to have been said at least by April 2015. On November 6, 2015, Plaintiffs' liaison counsel told Defendants' liaison counsel that Plaintiffs would request leave to file an amended complaint to include "facts asserting direct admissions of price fixing by Progressive and State Farm." November 6, 2015 Email from Allison Fry to Hal Litchford attached as Ex. 1. Plaintiffs raised this again in January 2016, requesting a February 2016 Status Conference to discuss a motion to amend. Doc. 261 in Case No. 6:14-cv-02557. However, instead of seeking leave to amend, Plaintiffs forced the Court to review and consider their 511 paragraph SAC and briefing on three motions to dismiss and prepare an 18-page Order. After wasting the Court's time, Plaintiffs now ask for a do-over. It is within the Court's sound discretion to deny Plaintiffs' request, and the Court should do so here. [3]

[3] In addition to the arguments set out above, Nationwide incorporates the additional arguments and authorities addressing the merits of plaintiffs' allegations in the Reply Briefs in Support of Certain Defendants' Motions to Dismiss the First Amended Complaints in *Legends*, No. 6:14-cv-06006, Doc. 105 at 2-5 (December 8, 2015) and *The Only One, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 6:14-cv-06009, Doc. 56 at 2-4 (December 8, 2015).

DATED this 18th day of March, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of March, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a Notice of Electronic Filing to all counsel of record that are registered with the Court's CM/ECF system.

/s/ Dan W. Goldfine
Dan W. Goldfine

EXHIBIT 1

From: allison fry [mailto:allison@eaveslaw.com]
Sent: Friday, November 06, 2015 3:12 PM
To: Litchford, Hal
Subject: A few matters

Good afternoon, Hal,

A few things to go over with you:
1) We will be requesting leave to file a rebuttal to the replies to the most recent motions to dismiss. Just writing that sentence gave me a headache. Yes, I know the responses have not yet been filed, much less the replies, but based upon history, Defendants will be filing replies and I do not wish to leave those unrebutted as we have had to in the past.
2) We will be requesting leave to file amended complaints in MS, UT, IN, LA, TN to include the facts not available at the time those amended complaints were filed, most particularly but not limited to the facts asserting direct admissions of price fixing by Progressive and State Farm, facts showing other insurers are required to comply with State Farm's determination of labor rates and similar facts showing both direct and circumstantial evidence of conspiracy to fix prices. Since those complaints were amended on something of a rolling basis, one or more contain some of the information already but not all, particularly the Progressive admission.
3.) We will be asking for a hearing on the motions for sanctions filed against GEICO. That isn't really any responsibility of yours and I will communicate this directly to GEICO counsel but, as a courtesy, I let you know.

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