

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22 CVS 4473

TRAIL CREEK INVESTMENTS LLC
and WARREN OIL COMPANY, LLC,

Plaintiffs,

v.

WARREN OIL HOLDING
COMPANY, LLC, et al.;

Defendants.

**ORDER AND OPINION ON
PLAINTIFFS' RENEWED MOTION
FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT**

THIS MATTER is before the Court upon Plaintiffs Trail Creek Investments LLC and Warren Oil Company, LLC's (collectively, "Trail Creek") Renewed Motion for Leave to File Second Amended Complaint ("Motion to Amend," ECF No. 94).

THE COURT, having considered the Motion to Amend, the briefs of the parties, the arguments of counsel, the applicable law, and all appropriate matters of record, **CONCLUDES** that the Motion to Amend should be **GRANTED**, in part, and **DENIED**, in part, as set forth below.

Tuggle Duggins P.A., by Denis E. Jacobson, Jeffrey S. Southerland, Brandy L. Mansouraty, Daniel D. Stratton, and Shauna L. Baker-Karl, for Plaintiffs.

Robinson, Bradshaw & Hinson, P.A. by David C. Wright, Stephen D. Feldman, Melissa A. Romanzo, Andrew R. Wagner, and Emma W. Perry, for Defendants.

Davis, Judge.

INTRODUCTION

1. As this Court has previously noted, this case concerns allegations that “Defendants fraudulently failed to disclose substantial existing environmental liabilities in connection with the sale of Warren Oil Company, Inc. (“Warren Oil”), Warren Unilube, Inc. (“Warren Unilube”), and their affiliated companies, to [Trail Creek].” *Trail Creek Investments LLC v. Warren Oil Holding Company, LLC*, 2023 NCBC LEXIS 70, at **1–2 (N.C. Super. Ct. May 9, 2023) (“9 May Opinion”). In its Motion to Amend, Trail Creek seeks leave (over Defendants’ opposition) to file a new Second Amended Complaint that (1) restates several claims—most notably, claims for fraud and civil conspiracy—that the Court previously dismissed without prejudice; and (2) adds new allegations purporting to show through parol evidence the parties’ intent regarding the proper interpretation of key indemnification provisions of their Equity Interest Purchase Agreement (“EIPA”).

FACTUAL AND PROCEDURAL BACKGROUND

2. A complete summary of the factual background of this case—as alleged in Trail Creek’s First Amended Complaint (“FAC”), which is currently its operative pleading—can be found in the Court’s 9 May Opinion and is not repeated herein.

3. In short, Warren Oil, Warren Unilube, and their affiliated entities (collectively, the “Companies”) were operated by Defendants in six different states and produced lubricants and chemical products, primarily for use in the automotive industry. (FAC ¶¶ 14, 35–36, ECF No. 40.) In 2016, Trail Creek acquired all issued and outstanding equity interests in the Companies from Defendants. *Trail Creek*

Investments LLC, 2023 NCBC LEXIS 70, at **3. The terms of that acquisition were memorialized in the EIPA. *Id.*

4. On 26 April 2022, Trail Creek filed its original Complaint in this matter accusing Defendants of orchestrating a “sophisticated, concerted, and ongoing fraud.” (Compl. ¶ 1, ECF No. 3.) The Complaint alleged misrepresentations and nondisclosures by Defendants relating to various environmental liabilities existing within the Companies. (Compl. ¶ 3.)

5. On 27 June 2022, Defendants moved to dismiss eleven of the twelve claims in Trail Creek’s Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. (Defs.’ Mot. Dismiss, ECF No. 19.) Defendants’ motion was rendered moot, however, when Trail Creek filed the FAC on 16 August 2022.

6. On 15 September 2022, Defendants filed a Partial Motion to Dismiss the FAC. (Defs.’ Part. Mot. Dismiss FAC, ECF No. 53.)

7. On 17 April 2023, Trail Creek filed a motion seeking leave to file a new amended complaint. (Pls.’ Mot. Leave File Second Am. Compl., ECF No. 78.) In that motion, Trail Creek submitted that on 2 December 2022 and 31 March 2023, it had received in discovery copies of communications produced by Defendants and a third-party, Wells Fargo Securities, LLC, which were relevant to the proper interpretation of certain indemnification provisions in the EIPA and revealed the existence of a latent ambiguity therein. (Pls.’ Mot. Leave File Second Am. Compl., at 2.)

8. While that motion to amend was pending, the Court entered its 9 May Opinion in which the Court dismissed without prejudice a number of claims asserted

by Trail Creek in the FAC, including, *inter alia*, Trail Creek's claims for fraud and civil conspiracy based on its failure to plead those claims with the requisite degree of specificity. *Trail Creek Investments LLC*, 2023 NCBC LEXIS 70, at **34–36, 45–46.

9. On 12 May 2023, the Court conducted a status conference with counsel for all parties in attendance. During the status conference, Trail Creek's counsel represented to the Court that it intended to seek leave to file a new complaint restating several of the claims that had been dismissed without prejudice. In response, the Court informed counsel that it preferred to address all of Trail Creek's proposed amendments in a single motion. Accordingly, on 16 May 2023, the Court entered an Order denying Trail Creek's original motion to amend "without prejudice to [Trail Creek's] ability to file a renewed motion seeking leave to file a Second Amended Complaint." (ECF No. 84.)

10. On 21 June 2023, Trail Creek filed the present Motion to Amend and attached thereto its proposed Second Amended Complaint ("SAC").

11. In the proposed SAC, Trail Creek seeks to replead its fraud and civil conspiracy claims with beefed-up allegations, add the above-referenced allegations regarding the EIPA's purported latent ambiguity, and provide a more detailed list of the environmental regulations that were allegedly violated by Defendants with regard to the Companies. (Mot. Am. ¶ 10.)

12. A hearing on the Motion to Amend was held on 14 September 2023, and the Motion is now ripe for resolution.

LEGAL STANDARD

13. Motions to amend are governed by Rule 15 of the North Carolina Rules of Civil Procedure. Rule 15(a) provides, in relevant part, as follows:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

N.C. R. Civ. P. 15(a).

14. Although Rule 15 states that leave shall be freely given, “the rules still provide some protection for parties who may be prejudiced by liberal amendment.” *Vitaform, Inc. v. Aeroflow, Inc.*, 2021 NCBC LEXIS 79, at **11 (N.C. Super. Ct. Sept. 16, 2021) (quoting *Henry v. Deen*, 310 N.C. 75, 82 (1984)). As a result, an amendment may be denied for reasons of “undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice, and futility of amendment.” *Id.* (quoting *Bartlett Milling Co. v. Walnut Grove Auction and Realty Co.*, 192 N.C. App. 74, 89 (2008)). “The burden is upon the opposing party to establish that [it] would be prejudiced by the amendment.” *Id.*

15. The decision whether to grant or deny a motion to amend is within the discretion of the trial court, and its decision will not be reversed except in case of manifest abuse. *Id.* (citing *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 603 (2018)).

ANALYSIS

16. The Court deems it appropriate to group the amendments contained within Trail Creek’s proposed SAC into two categories: (1) newly pled fraud and civil

conspiracy claims containing greater specificity along with a more detailed recitation of the environmental regulations allegedly violated by Defendants (but not disclosed to Trail Creek); and (2) new allegations (contained in paragraphs 150–155 of the proposed SAC) in support of Trail Creek’s assertion that a latent ambiguity exists within pertinent indemnification provisions of the EIPA, requiring consideration of parol evidence. As to each category, Defendants assert that the proposed amendments should not be allowed on the grounds of undue delay, prejudice, and futility. (Defs.’ Resp. Br., at 1, ECF No. 100.) The Court will analyze each category in turn.

I. New Allegations of Fraud and Civil Conspiracy

A. Undue Delay

17. As noted above, the Court dismissed without prejudice Trail Creek’s claims for fraud and civil conspiracy on 9 May 2023. *Trail Creek Investments LLC*, 2023 NCBC LEXIS 70, at **34–36, 45–46.

18. Trail Creek filed its Motion to Amend on 21 June 2023—43 days later. (Mot. Am., ECF No. 94.)

19. By exercising its discretion to dismiss these claims *without* prejudice rather than *with* prejudice, the Court implicitly allowed Trail Creek the opportunity to timely file a motion seeking permission to amend the pleading to address the deficiencies identified by the Court in its 9 May Opinion as to those claims.

20. The Court is unable to say that the 43-day period that elapsed between the Court’s entry of its 9 May Opinion and Trail Creek’s filing of its Motion to Amend

was unreasonable. *See Columbus Life Ins. Co. v. Wells Fargo Bank, N.A.*, 2022 NCBC LEXIS 40, at **13, 20 (N.C. Super. Ct. May 3, 2022) (allowing motion to amend after one-month delay and noting that a one-month delay stood “in stark contrast to cases in which North Carolina courts have found undue delay in the Rule 15 context”).

B. Prejudice

21. Defendants have failed to show any material prejudice that would result from allowing the first category of proposed amendments. Indeed, the Court observes that rather than constituting a new theory in this case, fraud was alleged by Trail Creek in its original Complaint back on 26 April 2022. (Compl. ¶¶ 262–78.) Therefore, prejudice is not a valid ground for denial of the proposed amendments making up this first category. *See Sampson-Bladen Oil Co. v. Walters*, 86 N.C. App. 173, 177 (1987) (finding no prejudice where opposing counsel knew “more than a year earlier” that certain charges would be an important factor in the case).

C. Futility

22. In its 9 May Opinion, this Court held that the fraud claim contained in Trail Creek’s FAC was not pled with the degree of particularity required pursuant to Rule 9(b) of the North Carolina Rules of Civil Procedure. *Trail Creek Invs. LLC*, 2023 NCBC LEXIS 70, at **34–36. The Court also ruled that Trail Creek’s civil conspiracy claim was likewise too vague to survive Defendants’ motion to dismiss. *Id.*, at **45–46.

23. Although Defendants argue that the newly pled fraud claim contained in Trail Creek’s proposed SAC continues to suffer from this same deficiency, (Defs.’ Resp. Br., at 11–13), the Court disagrees.

24. The Court has carefully considered the new allegations in support of Trail Creek’s fraud claim in the proposed SAC and is satisfied that this claim has now been pled with the sufficient degree of particularity required under North Carolina law.¹

25. Additionally, Defendants contend that Trail Creek’s request for leave to file the amended fraud and civil conspiracy claims should be denied on futility grounds because both claims are barred by the applicable statutes of limitations. (Defs.’ Resp. Br., at 19–22.) Specifically, Defendants argue that, as a result of Trail Creek’s failure to satisfy Rule 9(b)’s heightened particularity requirement in its FAC, the newly pled claims in its SAC do not “relate back” to the date of their original filing for purposes of Rule 15(c). (Defs.’ Resp. Br., at 19–22.) In support of this argument, Defendants cite two cases from our Court of Appeals. *See D&B Marine, LLC v. AIG Prop. Cas. Co.*, 288 N.C. App. 106, 116 (2023) (“[W]hen a claim requires unique factual allegations, those allegations must be present in the original complaint to meet the requirements of Rule 15(c) so that the amended complaint relates back to the original complaint.”); *State Farm Fire and Cas. Co. v. Darsie*, 161 N.C. App. 542, 546 (2003) (“[W]hen a claim requires unique factual allegations such as fraud, medical

¹ Defendants do not appear to be arguing that the newly pled civil conspiracy claim remains impermissibly vague.

malpractice and lack of informed consent, there must be *some* of those unique allegations present in the original counterclaim.” (emphasis added)).

26. However, even assuming—without deciding—that the rule set out in *D&B Marine* and *State Farm* applies in the context of refiled claims that were previously dismissed without prejudice by a court (which is not entirely clear), the Court continues to believe—as it stated in its 9 May Opinion—that a more factually developed record is necessary before a definitive ruling can be made based on the application of the statute of limitations to these claims.² See *Trail Creek Invs. LLC*, 2023 NCBC LEXIS 70, at **26.

27. For these reasons, Trail Creek’s Motion to Amend is **GRANTED** as to its new claims for fraud and civil conspiracy as well as the accompanying allegations pled in support of those claims.

II. New Allegations of Latent Ambiguity in Indemnification Provisions in EIPA

28. The Court reaches a different conclusion, however, with regard to the allegations contained in paragraphs 150–155 of the proposed SAC purporting to support Trail Creek’s argument regarding the existence of a latent ambiguity in the indemnification provisions of the EIPA.

29. In their existing breach of contract claim, Trail Creek asserts that “contrary to the Representations and Warranties contained therein, there were material undisclosed liabilities within the [k]nowledge of the Defendants.” (FAC ¶

² Defendants will, of course, have the right to renew this argument—if they choose to do so—at the summary judgment stage.

315.) Furthermore, Trail Creek asserts that Defendants breached the EIPA “because they failed and refused to indemnify [Trail Creek] against the Losses and Liabilities arising from the breach of the Sellers’ Representations and Warranties, in accordance with the terms of the EIPA.” (FAC ¶ 327.)

30. In a nutshell, the parties disagree on whether the indemnification provisions at issue should be construed as requiring Defendants to indemnify Trail Creek for 100% of its losses (as Trail Creek contends) or for only 50% of those losses (as Defendants contend) arising from Defendants’ allegedly fraudulent failure to disclose the Companies’ liabilities relating to “Special Environmental Indemnity Matters” prior to the sale of the Companies to Trail Creek.

31. Trail Creek did not assert in either the original Complaint or the FAC that the indemnification provisions of the EIPA contained any ambiguities—latent or otherwise. In their proposed SAC, however, Trail Creek contends that these provisions do, in fact, contain a latent ambiguity and that, as a result, parol evidence concerning the parties’ negotiations and contemporaneous understanding of the meaning of these provisions should be considered. (SAC ¶¶ 150–55.)

32. Defendants, conversely, oppose the amendments, primarily contending that the new allegations in paragraphs 150–155 of the SAC are untimely and futile. (Defs.’ Resp. Br., at 4–8, 23–27.)

A. Undue Delay

33. “In deciding if there was undue delay, the trial court may consider the relative timing of the proposed amendment in relation to the progress of the lawsuit.” *Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 679 (2013) (affirming trial court’s denial of motion to amend filed thirteen months after filing of initial complaint) (quoting *Draughon v. Harnett Cnty. Bd. of Educ.*, 166 N.C. App. 464, 467 (2004)).

34. Trail Creek’s original Complaint was filed on 26 April 2022. The FAC was filed on 16 August 2022. As noted above, neither of these pleadings asserted the existence of an ambiguity in the indemnification provisions of the FAC.

35. In Defendants’ motion to dismiss, they asserted that they were only obligated to indemnify Plaintiffs on a 50% basis (even for fraudulent misrepresentations or omissions) based on the plain language of the relevant provisions of the EIPA. (Defs.’ Part. Mot. Dismiss Pls.’ FAC, at 3; Defs.’ Br. Supp. Part. Mot. Dismiss Pls.’ FAC, at 39, ECF No. 54.) In response, Trail Creek—although vigorously disagreeing with Defendants’ proffered interpretation and contending that the language at issue should instead be construed to require indemnification on a 100% basis—likewise relied solely on the four corners of the EIPA. (Pls.’ Resp. Defs.’ Part. Mot. Dismiss, at 9–12, ECF No. 66.)

36. It was not until 17 April 2023 that Trail Creek first sought leave to allege an ambiguity in the EIPA. (Pls.’ Mot. Leave File Second Am. Compl., at 2–3.) This was 356 days after the initial filing of this lawsuit.

37. The Court finds that Trail Creek's delay in asserting their new allegations concerning a latent ambiguity in the indemnification provisions is excessive.

38. Although Trail Creek argues that it could not have asserted this argument until it received documentary evidence through discovery of the parties' purported intent on this issue, (Pls.' Br. Supp. Mot. Am., at 15–18, ECF No. 95), the Court is not convinced by this argument. Trail Creek was a party to the EIPA and was directly involved in negotiating its terms. There is no reason why it should have needed to obtain discovery in order to know of the discussions that took place between the parties during the negotiations leading up to the EIPA.

39. Furthermore, Trail Creek had every opportunity to make an ambiguity-based argument in opposing Defendants' Motion to Dismiss. Yet it did not do so—instead taking the position that the issue could be resolved *based solely on the language of the EIPA*. (Pls.' Resp. Defs.' Part. Mot. Dismiss, at 10.)

40. Accordingly, the Court concludes that Trail Creek's delay was excessive. *See, e.g., Walker v. Sloan*, 137 N.C. App. 387, 402 (2000) (affirming denial of motion to amend after 142-day delay); *Caldwell's Well Drilling, Inc. v. Moore*, 79 N.C. App. 730, 731 (1986) (affirming denial of motion to amend after a nearly four-month delay).

B. Futility

41. Finally, the Court is unpersuaded by the substance of Trail Creek's argument that a latent ambiguity exists in the indemnification provisions of the EIPA.

42. “A latent ambiguity may arise where the words of a written agreement are plain, but by reason of extraneous facts the definite and certain application of those words is found impracticable.” *Miller v. Green*, 183 N.C. 652, 652 (1922).

43. For the sake of brevity, the Court will not go through an analysis of the deficiencies in Trail Creek’s argument. Instead, it is sufficient to say that the Court has painstakingly reviewed the pertinent provisions of the EIPA and the parties’ respective arguments. In doing so, the Court has concluded that Trail Creek has failed to show the existence of a latent ambiguity under North Carolina law.

44. Notably, the Court lacks the authority to judicially insert language into an unambiguous contract (language that the parties themselves did not see fit to include) based simply on arguments as to their alleged intent. This is especially true when the contract contains a merger clause, as the EIPA does in section 12.10. (EIPA § 12.10, ECF No. 94.3.) *See Zinn v. Walker*, 87 N.C. App. 325, 333 (1987) (“North Carolina recognizes the validity of merger clauses and has consistently upheld them.”). Indeed, “merger clauses were designed to effectuate the policies of the [p]arol [e]vidence [r]ule; i.e., barring the admission of prior and contemporaneous negotiations on terms inconsistent with the terms of the writing.” *Id.*

45. It need hardly be said that a litigant is not permitted to create an ambiguity in a contract that does not otherwise exist simply by pointing to evidence arguably suggestive of the parties’ intent. Indeed, our courts have long held that “[a] party may not use parol evidence to *create* ambiguity where the terms of the contract are clear.” *Brown v. Scism*, 50 N.C. App. 619, 624 (1981) (emphasis added).

46. For these reasons, the Court concludes that Trail Creek's Motion to Amend should be denied as to paragraphs 150–155 of the proposed SAC based on futility grounds as well.³ See *Cunningham v. Riley*, 169 N.C. App. 600, 604 (2005) (affirming trial court's denial of motion to amend because proposed amendment would have been futile).

CONCLUSION

47. **THEREFORE**, the **COURT**, in the exercise of its discretion, hereby **GRANTS** Trail Creek's Motion to Amend except as to the allegations contained in paragraphs 150–155 of the proposed SAC. As to the allegations in paragraphs 150–155, the Motion to Amend is **DENIED**. Trail Creek shall have **ten (10) days** from the date of this Order in which to file a Second Amended Complaint consisting of the allegations and claims contained in the proposed SAC, except that those allegations presently contained in paragraphs 150–155 of the proposed SAC shall not be included.

SO ORDERED, this the 13th day of October, 2023.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge for
Complex Business Cases

³ The Court wishes to emphasize, however, that despite denying Trail Creek leave to assert the allegations contained in paragraphs 150–55 of the proposed SAC, the Court is not making any ruling at the present time on the ultimate issue of whether indemnification at a 50% basis or at a 100% basis is called for under the EIPA with regard to fraudulent misrepresentations or omissions. No ruling on that subject will be made until the issue is squarely before the Court, which is not currently the case. But when the Court does decide that issue, it will be based solely upon the language in the EIPA.