

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18CVS012299-590

RFACTR, INC; RICHARD
BRASSER; and GREG GENTNER,

Plaintiffs/Counterclaim
Defendants,

v.

CHRIS MCDOWELL and
CAROLINE MCDOWELL,

Defendants/
Counterclaim Plaintiffs.

**ORDER ON DEFENDANTS' MOTION
TO SUPPLEMENT AND/OR AMEND
COUNTERCLAIMS**

1. **THIS MATTER** is before the Court upon Defendants/Counterclaim Plaintiffs Chris McDowell (“Chris”) and Caroline McDowell’s (“Caroline”; together, “Defendants”) Motion to Supplement and/or Amend Counterclaims (the “Motion”) pursuant to Rules 15(d), 13(h), and 20(a) of the North Carolina Rules of Civil Procedure (the “Rule(s”).¹

2. Having considered the Motion, the parties’ briefs in support of and in opposition to the Motion, the relevant pleadings, and the arguments of counsel at the hearing on the Motion, the Court hereby memorializes its oral ruling at the hearing and **GRANTS** the Motion.

¹ (Def. Mot. Suppl. and/or Amend Countercls. [hereinafter “Mot.”], ECF No. 237.)

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. The Court does not make findings of fact on the Motion, but the factual allegations supporting the claims and counterclaims in this action are summarized in the Court's 8 December 2020 Order and Opinion on Plaintiffs' and Defendants' Motions for Summary Judgment and Defendants' Amended Motion to Strike and/or Preclude Reliance on Affidavit of Luis Gomez (the "2020 Summary Judgment Order"), *see rFactr, Inc. v. McDowell*, 2020 NCBC LEXIS 144, at *5–15. (N.C. Super. Ct. Dec. 8, 2020), and the Court's 27 January 2023 Order and Opinion on Defendants' Motion for Summary Judgment and Defendants' Motion to Strike or Preclude Reliance on Certain Statements of the Declaration of Luis Gomez (the "2023 Summary Judgment Order"; together with the 2020 Summary Judgment Order, the "Summary Judgment Orders"), *see rFactr, Inc. v. McDowell*, 2023 NCBC LEXIS 18, at *3–11 (N.C. Super. Ct. Jan. 27, 2023).

4. Plaintiff rFactr, Inc. ("rFactr") initiated this action on 21 June 2018, asserting claims against both Defendants for tortious interference with prospective economic advantage and defamation, and against Chris alone for breach of fiduciary duty.² rFactr subsequently filed the First Amended Complaint on 16 August 2018,³ and later, with leave of the Court,⁴ filed a Second Amended Complaint on 25 October

² (See Compl. ¶¶ 44–60, ECF No. 123.)

³ (First Am. Compl., ECF No. 3.)

⁴ (Order Pl.'s Unopposed Mot. Leave Amend Compl., ECF No. 15.)

2018 that added additional claims against Defendants as well as Plaintiffs Richard Brasser (“Brasser” or “Richard”) and Greg Gentner (“Gentner”; together with rFactr and Brasser, “Plaintiffs”) as party plaintiffs.⁵ In the Second Amended Complaint, rFactr asserted claims against both Defendants for tortious interference with prospective economic advantage and unfair and deceptive trade practices, and against Chris for breach of fiduciary duty.⁶ Brasser and Gentner also asserted a claim against Defendants for defamation.⁷

5. On 18 September 2018, this action was designated as a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4(a)(1).⁸

6. On 27 November 2018, and in response to Plaintiffs’ Second Amended Complaint, Defendants asserted counterclaims against (i) rFactr for shareholder inspection and breach of contract, (ii) Brasser and Gentner for breach of fiduciary duty and fraudulent misrepresentation/concealment of material fact, and (iii) rFactr, Brasser, and Gentner for constructive fraud.⁹

7. On 8 December 2020, this Court issued the 2020 Summary Judgment Order, granting summary judgment (i) for Brasser and Gentner on Caroline’s counterclaims

⁵ (See Second. Am. Compl. ¶¶ 84–109, ECF No. 16.)

⁶ (See Second Am. Compl. ¶¶ 84–88, 97–109.)

⁷ (See Second Am. Compl. ¶¶ 89–96.)

⁸ (Designation Order, ECF No. 1.)

⁹ (See McDowells’ Ans. Pls.’ Second Am. Compl. and Countercls. Against rFactr, Inc., Richard Brasser, and Greg Gentner ¶¶ 98–147 [hereinafter “Ans. and Countercls.”], ECF No. 18.)

for breach of fiduciary duty, constructive fraud, and fraudulent misrepresentation, and (ii) for rFactr on Caroline’s counterclaims for breach of contract and constructive fraud, and on Defendants’ counterclaim for shareholder inspection. *rFactr, Inc.*, 2020 NCBC LEXIS 144, at *42–43.

8. On 31 March 2021, the Court noticed a jury trial to commence on 11 July 2022 on the remaining claims.¹⁰ On 13 May 2022, two years after the close of discovery and only two months before the scheduled trial, Plaintiffs produced a large number of new documents and identified new witnesses for presentation at trial (the “Late Information”).¹¹ After continuing the trial to 5 December 2022 for unrelated reasons,¹² the Court, in its discretion, reopened discovery for the limited purpose of affording Defendants an opportunity to conduct discovery and motion practice concerning the Late Information.¹³ The Court subsequently continued the trial to 13 February 2023.¹⁴

9. On 17 November 2022, and with the Court’s permission, Defendants filed a second motion for summary judgment, seeking judgment on all claims.¹⁵ The Court thereafter issued the 2023 Summary Judgment Order, granting summary judgment

¹⁰ (Notice Jury Trial, ECF No. 127.)

¹¹ (*See* Order Defs.’ Mot. in Lim. Exclude Late-Disclosed Info. ¶ 5, ECF No. 183.)

¹² (Notice Jury Trial, ECF No. 170.)

¹³ (*See* Order Defs.’ Mot. in Lim. Exclude Late-Disclosed Info. ¶ 8(a).)

¹⁴ (Notice Jury Trial, ECF No. 201.)

¹⁵ (Defs.’ Mot. Summ. J. Pls.’ Affirmative Claims, ECF No. 202.)

for Defendants as to (i) rFactr's claims against Chris for tortious interference with prospective economic advantage and unfair and deceptive trade practices, and (ii) Brassier and Gentner's claim against Chris for slander per se, and against Caroline for her allegedly defamatory statements that rFactr and its owners were in difficult financial straits, had withdrawn their children from school, and left the country. *See rFactr, Inc.*, 2023 NCBC LEXIS 18, at *51.

10. In January 2023, Brassier and Gentner were indicted in the United States District Court for the Western District of North Carolina for alleged federal tax crimes. In its discretion, and with the consent of all parties, the Court cancelled the February 2023 trial setting and stayed this action pending final resolution of Brassier and Gentner's criminal trial.¹⁶

11. On 2 April 2024, counsel for Brassier and Gentner advised the Court that Brassier and Gentner were tried and convicted of five of the criminal charges against them on 12 March 2024.¹⁷ On 24 April 2024, and after convening a status conference at which all of the parties were represented by counsel, the Court lifted the stay.¹⁸ That same day, the Court noticed a jury trial on the remaining claims to commence on 4 November 2024.¹⁹

¹⁶ (*See* Consent Order Staying Litig., ECF No. 224.)

¹⁷ (*See* April 2024 Status Rep., ECF No. 231.)

¹⁸ (Order Lifting Stay and Requiring Updates, ECF No. 233.)

¹⁹ (Notice Jury Trial, ECF No. 235.)

12. As a result of the Summary Judgment Orders, the claims remaining for trial in this action are (i) Brassers and Gentner's slander per se claim against Caroline for her statement that "rFactr's owners were under investigation for arson," (ii) rFactr's claims against Caroline for tortious interference with prospective economic advantage and unfair and deceptive trade practices, (iii) rFactr's claim against Chris for breach of fiduciary duty, (iv) Chris's counterclaims against Brassers and Gentner for breach of fiduciary duty, constructive fraud, and fraudulent misrepresentation, and (v) Chris's counterclaims against rFactr for breach of contract and constructive fraud. *rFactr, Inc.*, 2023 NCBC LEXIS 18, at *51.

13. Defendants filed the current Motion on 9 May 2024, seeking leave to supplement and/or amend their counterclaims to add Richard Brassers's wife, Megan Brassers ("Megan"; together with Richard, the "Brassers"), as a party plaintiff, as well as a new counterclaim against the Brassers for defamation (the "Supplemental Counterclaim").²⁰ Defendants' Supplemental Counterclaim alleges that, beginning in September 2023 and continuing until at least April 2024, the Brassers created a fundraising website titled "Brassers Family Justice," which contained the following statements that Defendants allege were defamatory: (i) Defendants were "predators," "perpetrators," and a "psychopathic couple" with a "psychopathic obsession to bring [Richard] down," (ii) Defendants "aimed to sabotage [Richard's] reputation and [Richard's] company and oust [Richard] as CEO to cover-up their crimes," and (iii)

²⁰ (*See Mot. 1.*)

Chris committed securities fraud.²¹ Defendants also allege that the Brassers posted defamatory videos on Facebook and YouTube, which remain available for public viewing today and contain the following allegedly defamatory statements: (i) Defendants were “top-notch manipulators,” “psychopaths,” and “predators” who “‘terrorized’ the Brassers and were ‘capable of the unthinkable,’” (ii) the Brassers wanted to “relook at all the evidence to see whether our family was purposely put on fire,” and (iii) Megan would not “let [her] babies be set on fire and let their dad go to jail for the real criminals’ crimes.”²²

14. After full briefing, the Court convened a hearing on the Motion on 9 July 2024 (the “Hearing”), at which all parties were represented by counsel. The Court indicated its intent to grant the Motion at the Hearing, and this Order memorializes the Court’s forecasted ruling.

II.

LEGAL STANDARD

15. Pursuant to Rule 15(d), a court may, “[u]pon reasonable notice and upon such terms as are just, permit [a party] to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented[.]” N.C.R. Civ. P. 15(d). “[M]otions to allow supplemental pleadings should be freely granted unless their allowance would

²¹ (Defs./Countercl. Pls.’ Br. Supp. Defs.’ Mot. Suppl. and/or Amend Countercls. Ex. 1 ¶¶ 89–91 [hereinafter “Proposed Suppl. Countercl.”], ECF No. 238.2.)

²² (Proposed Suppl. Countercl. ¶¶ 98–101.)

impose a substantial injustice upon the opposing party.” *Miller v. Ruth’s of N.C., Inc.*, 69 N.C. App. 153, 156 (1984).

16. Similarly, leave to amend under Rule 15(a) “shall be freely given when justice so requires.” N.C.R. Civ. P. 15(a). “[A]mendments should be freely allowed unless some material prejudice to the other party is demonstrated.” *Vaughan v. Mashburn*, 371 N.C. 428, 433 (2018). A motion for leave to amend under Rule 15(a) may be denied for “(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments.” *House of Raeford Farms, Inc. v. City of Raeford*, 104 N.C. App. 280, 282 (1991).

17. As applied, “the standards used . . . in ruling on a motion to amend or on a motion to supplement are nearly identical.” *Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, *17–18 (N.C. Super. Ct. Dec. 22, 2021) (quoting *Franks v. Ross*, 313 F.3d 184, 198 n.15 (4th Cir. 2002)).

III.

ANALYSIS

18. Defendants contend that the Motion should be granted because the “[Supplemental Counterclaim] is premised on the basis of newly discovered information and evidence pertinent to and interconnected with the parties and claims currently underlying this action.”²³

19. Plaintiffs oppose the Motion on three primary grounds: (i) Defendants unduly delayed in seeking to supplement or amend, (ii) permitting the Supplemental

²³ (Mot. 1.)

Counterclaim to be asserted will result in unfair prejudice, and (iii) the Supplemental Counterclaim does not arise out of the same transaction or occurrence as the original Complaint and thus should not be tried with the existing claims and counterclaims.²⁴

20. After careful consideration and review, and as announced at the Hearing, the Court, in the exercise of its discretion, **GRANTS** the Motion for the reasons set forth below.

A. Undue Delay

21. “[A] trial court may appropriately deny a motion for leave to amend on the basis of undue delay where a party seeks to amend its pleading after a significant period of time has passed since filing the pleading and where the record or party offers no explanation for the delay.” *Rabon v. Hopkins*, 208 N.C. App. 351, 354 (2010). “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.” *Draughon v. Harnett Cnty. Bd. Educ.*, 166 N.C. App. 464, 467 (2004).

²⁴ (See Pls.’ Opp’n Defs.’ Mot. Suppl. and/or Amend Countercls. 9 [hereinafter “Br. Opp’n”], ECF No. 242.) Plaintiffs also oppose the Motion on the ground that the Supplemental Counterclaim does not meet the criteria for Business Court designation. (Br. Opp’n 2–3.) Designation as a mandatory complex business case, however, is determined when the pleading on which designation is sought is filed. N.C.G.S. § 7A-45.4(f). Once the decision to designate has been made, “[a]ll proceedings in the action shall be before the Business Court Judge to whom it has been assigned unless and until . . . the Chief Justice revokes approval.” *Id.*; see also *PKT1, LLC v. Vaynberg*, 2022 NCBC LEXIS 72, at *2 (N.C. Super. Ct. July 5, 2022) (“[O]nce a designation order has issued, designation to the Business Court is not affected by subsequent filings or court action.”). Accordingly, Plaintiffs’ argument is without merit.

22. The Court concludes, in the exercise of its discretion, that Defendants did not unduly delay in seeking leave to supplement or amend given the procedural context of this case.

23. First, Rule 15(d) allows parties to supplement claims based on “transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented.” N.C.R. Civ. P. 15(d). Here, all of the conduct on which the Supplemental Counterclaim is based arose within the past year and long after the filing of this action in 2018. Moreover, the Brassers’ alleged conduct occurred during the stay period, and Defendants filed the Motion only fifteen days after the Court lifted the stay. While the Court agrees with Plaintiffs that Defendants could have “notified counsel . . . and the Court of the need for a conference” to discuss lifting the stay to permit the Motion to be filed, the fact remains that the stay was in effect when the alleged misconduct occurred, and the Court does not find that Defendants’ failure to move to lift the stay caused Plaintiffs or the Brassers harm or unfair prejudice in the context of this case.²⁵ The Court therefore concludes that Defendants did not unduly delay in seeking leave to amend or supplement.

B. Undue Prejudice

24. Plaintiffs have also failed to demonstrate how permitting Defendants to add the Supplemental Counterclaim would result in substantial injustice. Plaintiffs contend that, despite Defendants’ representation that they do not intend to request additional discovery, allowing Defendants to assert the Supplemental Counterclaim

²⁵ (Br. Opp’n 5.)

and add Megan as a Plaintiff/Counterclaim Defendant would require “different evidence” and “further discovery” that would “further slow the litigation.”²⁶

25. Our appellate courts, however, have made clear that “[t]he fact that additional discovery may be required or that additional counsel may be required to represent the new defendant does not amount to prejudice or make the delay ‘undue.’” *Coffey v. Coffey*, 94 N.C. App. 717, 723 (1989); *see also N. River Ins. Co. v. Young*, 117 N.C. App. 663, 671 (1995); *Vitaform, Inc. v. Aeroflow, Inc.*, 2021 NCBC LEXIS 79, at *16 (N.C. Super. Ct. Sept. 16, 2021).

26. Moreover, it does not appear to the Court that the Supplemental Counterclaim will require extensive additional discovery or sufficiently delay the trial of this matter to cause Plaintiffs substantial injustice in the circumstances of this case. Indeed, Plaintiffs have caused the trial of this matter to be postponed twice—first, by producing the Late Information for the first time two years after the close of discovery and only two months before the trial of this matter was scheduled to commence and, second, by their federal indictment less than a month before the rescheduled trial was ready to proceed. Any trial delay caused by granting the Motion here will be less than the earlier delays caused by Plaintiffs and is only because the Brassers allegedly engaged in unlawful conduct during the stay period.

²⁶ (Br. Opp’n 5.)

C. Same Transaction or Occurrence

27. The Motion seeks to add Megan as a Counterclaim Defendant pursuant to Rules 13(h) and 20(a).²⁷ Plaintiffs contend that the Supplemental Counterclaim does not arise out of the same transaction or occurrence as Plaintiffs' existing claims for tortious interference with prospective economic advantage and breach of fiduciary duty and, thus, that Megan's joinder as an additional Counterclaim Defendant is improper.²⁸

28. "Where the essence of a Rule 15[d] motion to amend a pleading is to add a party to the lawsuit, consideration of [Rules] 20 and 21 is required." *Coffey*, 94 N.C. App. at 721. Rule 20 provides that defendants may be joined "if there is asserted against them . . . any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action." N.C. R. Civ. P. 20(a).

29. Plaintiffs concede that their existing claim for defamation and Defendants' proposed Supplemental Counterclaim for defamation overlap in certain respects but deny that they arise out of the same transaction or occurrence.²⁹ The Court disagrees. Both claims allege defamatory statements about who caused the fire at the Brassers' home. The Court concludes that this commonality is sufficient to establish that the claims arise out of the same transaction or occurrence. The Court further concludes

²⁷ (Defs./Countercl. Pls.' Br. Supp. Defs.' Mot. Suppl. and/or Amend Countercls. 1.)

²⁸ (Br. Opp'n 9.)

²⁹ (Br. Opp'n 6 ("[T]he proposed amendment/supplementation . . . contains a small nexus of overlapping facts related to the fire at the Brassers' home[.]").)

that granting the Motion and permitting the two defamation claims—each arising from the same fire—to be tried in the same action would promote judicial economy. *See, e.g., Mauney v. Morris*, 316 N.C. 67, 72 (1986) (overturning lower court’s denial of plaintiff’s motion to amend as an abuse of discretion and noting that permitting amendment would “promote[] judicial economy by avoiding the necessity for separate trials or for [plaintiff] to file first a separate complaint and then a motion to join the two actions.”).

IV.

CONCLUSION

30. **WHEREFORE**, for the reasons set forth above, the Court, in the exercise of its discretion, hereby **GRANTS** the Motion and **ORDERS** Defendants to file their Supplemental Counterclaim no later than 24 July 2024 and promptly thereafter to serve process on Megan Brassler consistent with the North Carolina Rules of Civil Procedure.

SO ORDERED, this the 18th day of July, 2024.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge