DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS/ST. JOHN

HARVEY M. HOFFMAN & JANICE E. HOFFMAN as Trustees of the HARVEY M. HOFFMAN & JANICE E. HOFFMAN Revocable Trust,

Plaintiffs,

v.

HAMMERHEAD CONSTRUCTION LLC STEPHEN RIVERA, and JENNIFER FIRESTONE,

Defendants.

3:21-cv-00046-RAM-EAH

TO: A. Jeffrey Weiss, Esq.
Ryan C. Meade, Esq.

ORDER

THIS MATTER comes before the Court on the "Motion and Combined Memorandum in Support of Leave to File Third Amended Complaint," filed on October 13, 2024 by Attorney A. Jeffrey Weiss, counsel for Plaintiffs Harvey M. Hoffman and Janice E. Hoffman, as Trustees of the Harvey M. Hoffman & Janice E. Hoffman Revocable Trust ("Plaintiffs"). Dkt. No. 253. In their motion, the Plaintiffs seek leave to amend their second amended complaint after the District Judge issued a Memorandum Opinion and Order on September 18, 2024 that, inter alia, dismissed six causes of action because Plaintiffs, as Trustees, "failed to establish the prudential exception to the injury-in-fact requirement that would permit third-party standing." Dkt. No. 248 at 6. Plaintiffs now assert that the Court should grant them leave to amend to remedy that pleading defect under the liberal standard enunciated in Fed. R. Civ. P. 15. The Court issues this Order without the need for a reply. LRCi 6.1(b)(6). For the reasons that follow, the Court will deny the motion.

BACKGROUND

Plaintiffs initially filed their Complaint in May 2021, alleging twelve causes of action against Defendants Hammerhead Construction LLC and Stephen Rivera based upon construction defects and incomplete repair and renovation work occurring primarily in 2017 and 2018 at property owned by the Hoffman Trust on St. Thomas, U.S. Virgin Islands. Dkt. No. 1. Defendants answered and the Court issued trial management orders that included an amendment deadline of September 2022 and a discovery deadline of November 2022. Dkt. Nos. 15, 74.

In their first motion to amend, filed in September 2022, Plaintiffs sought, inter alia, to correct the name of the Trust and to add the Hoffmans as individual Plaintiffs (as opposed to Trustees). Dkt. No. 80. Defendants opposed, arguing that they had been contending since the case had been filed that the Hoffmans as Trustees did not possess standing to assert claims for breach of contract (Count I), breach of implied warranty of proper workmanship (Count II), fraud or misrepresentation (Count III), unjust enrichment (Count IV), debt (Count V), or negligence/negligence per se (Count X), and they would be severely prejudiced by such an amendment on this dispositive issue. Dkt. No 90 at 9-10. The Court denied the motion to amend in part, holding that the Plaintiffs had been represented by competent counsel who presumably made a reasoned decision regarding the capacity in which they should bring their claims; moreover, Plaintiffs could have moved to amend to change the capacity under which they were suing immediately after the original complaint had been filed, but they

waited sixteen months to move to amend. That delay was "protracted and unjustified." Dkt. No. 102 at 11. Plaintiffs filed an objection. Dkt. No. 110.

In January 2023, Plaintiffs filed their Revised First Amended Complaint. Dkt. No. 114, and Defendants filed another motion to dismiss, Dkt. No. 116. Once again, Defendants raised the standing issue, arguing that the Hoffmans' counsel had made a reasoned decision regarding in what capacity the Hoffmans should bring their claims, but there was no allegation that the Hoffmans, as Trustees, entered into any contracts with Defendants, and thus Counts I, II, III, IV, V, and X should be dismissed for lack of standing. Dkt. No. 116-1 at 4-6 & n.6.

In September 2023, the District Judge addressed Plaintiffs' objections to this Court's Order granting in part and denying in part the Plaintiffs' motion to amend. Dkt. No. 173 (addressing Dkt. Nos. 102, 110). The District Judge upheld this Court's ruling that the complaint could not be amended to add the Hoffmans in their individual capacities. *Id.* at 2-3. The District Judge pointed out that this Court did not "ignore 'the fact that the Hoffmans assigned their interest in the property to the Trust, which included their contract rights,' as no such allegations exist in the proposed amendment," and agreed that the delay in seeking to amend was protracted. *Id*. The District Judge allowed other proposed amendments and the Plaintiffs filed their Second Amended Complaint ("SAC") on October 5, 2023. Dkt. No. 179. The Court issued orders that extended the remaining deadlines (expert and dispositive motion deadlines), but not the amendment deadline. *See, e.g.*, Dkt. No. 177.

In response to the SAC, Defendants Hammerhead and Rivera filed a motion to dismiss arguing, inter alia, that the SAC failed to allege that the damages incurred were sustained by the Hoffmans as Trustees of the Trust, which the Court had determined was the only capacity in which they could sue, again raising the standing issue. Dkt. No. 194 at 4, 5, 6 n.7, 8-10. Jennifer Firestone, as a newly-added Defendant, filed an answer. Dkt. No. 195. The parties completed expert discovery and mediated the case, to no avail.

Pursuant to the deadline in the operative scheduling order, Plaintiffs filed a motion for partial summary judgment in January 2024, Dkt. No. 223, along with a request for an extension of time to file another motion for partial summary judgment, Dkt. No. 224. The Court permitted them to file only one motion for partial summary judgment, which Plaintiffs filed on February 4, 2024, Dkt. Nos. 227, 228. Defendants filed an opposition, Dkt. No. 240, and Plaintiffs filed a reply on April 9, 2024, Dkt. No. 243, completing the briefing on the motion. Plaintiffs also filed a motion to schedule trial in April 2024. Dkt. No. 245.

In September 2024, the District Judge granted in part and denied in part Defendants' motion to dismiss the SAC. Dkt. Nos. 248, 249 (addressing Dkt. No. 193). He granted the motion in part, to the extent that he dismissed Counts I, II, III (except fraud with respect to the January 29, 2021 Notice of Claim of Construction Lien), IV, V, and X for lack of standing, and denied the motion in part, to the extent that he permitted Counts VI, VII, VIII, IX, and XII to proceed. *Id*. The District Judge ruled that the SAC contained no allegations that: (1) the Hoffmans assigned their individual rights arising from and related to their contracts with Defendants to the Trust, so as to pursue Counts I-V and X (except for the notice of

construction lien); (2) the Trust suffered any injury; or (3) the Trust made payments to Defendants based on the agreements at issue. Dkt. No. 249 at 5. Although the SAC alleged that the Hoffmans were grantors and beneficiaries of the revocable trust, their status as beneficiaries was contingent on the continued existence of the trust, which could be revoked at any time, and they failed to allege there was any hinderance to their ability to protect their own interests. *Id*. The District Judge concluded that neither the Trust nor the Hoffmans as Trustees possessed the rights sought to be enforced or suffered an injury in fact regarding the above claims, thereby failing to establish the prudential exception to the injury-in-fact requirement that would permit third-party standing to assert those claims. *Id*. at 5-6.[1]

On October 13, 2024, Plaintiffs moved again to amend their complaint, explaining that they could now allege facts showing that the Hoffmans assigned their rights to pursue the Claims in Counts I-III to the Trust, and that they were deleting former Counts IV, V, and X. Dkt. No. 253 at 1, 4.[2] Plaintiffs assert that they have "not previously sought to amend to

[1] The Memorandum Opinion also noted that the Hoffmans asserted identical claims against the Defendants in the companion case removed from the Superior Court of the Virgin Islands, *Hammerhead Construction, LLC v. Hoffman*, No. 3:23-cv-0014, "demonstrating their ability to protect their personal interests." Dkt. No. 248 at 5. The District Judge added that the court had previously denied the Hoffmans' motion to amend the complaint to add them in their individual capacities. *Id.* at 5-6, citing Dkt. No. 173. In a salient footnote, the District Judge noted that, despite the court's previous rejection of Plaintiffs' assertions that the Hoffmans assigned their contractual rights to the Trust with respect to the property at issue because no such allegations existed in the proposed amended complaint, "Plaintiffs persist in making the same baseless assertions in their opposition to the instant motion," *Id.* at 6 n.2 (citing Dkt. No. 173 at 2-3 and Dkt. No. 218 at 4-6, 12-13).

[2] Plaintiffs attach, as Exhibit 10 to the proposed Third Amended Complaint, an undated "Assignment of All Rights and Interests" executed by Harvey and Janice Hoffman, that confirmed that, upon creation of the Trust, they assigned all of their rights and interests in any personal property, any intangible property, any of their rights of action, and all of their

address the standing 'by assignment' issue, or the pleading deficiency Judge Molly's [sic] based his Sept. 18, 2024 decision on." *Id.* at 3. "Under these circumstances," Plaintiffs submit they should be granted leave to cure the SAC's pleading defects to ensure that the claims will be decided on the merits, rather than on technicalities. *Id.* They cite cases where a court dismissed a complaint but permitted a plaintiff to file an amended complaint to cure a standing-by-assignment pleading deficiency, since the first amendment did not occur in response to a court ruling on standing, *Animal Sci. Prods. v. China Minmetals Corp*., 34 F. Supp. 3d 465, 516 (D.N.J. 2014), and another case where the Third Circuit modified an order of dismissal to be "without prejudice" so the plaintiff could remedy the defect, *Marin v. Leslie*, 337 F. App'x 217 (3d Cir. 2009). *Id*. at 3-4. They add that because they believed the SAC "contained adequate factual asserts [sic] and inferences to survive the motion to dismiss" in light of Virgin Islands case law, they did not seek a new amendment while the court was considering the motion to dismiss the SAC. *Id*. at 4. But the District Judge "disregard[ed]" that case law and concluded that Plaintiffs failed to allege facts that would provide standing to assert Counts I-III. *Id*. Since cases should be resolved on their merits rather than on pleading technicalities, Plaintiffs contend that proposition establishes good cause for leave to amend. *Id.* Plaintiffs cite Rule 15 case law providing that motions to amend must be permitted in the absence of undue delay, bad faith, dilatory motive, unfair prejudice or futility of amendment, and conclusorily proclaim that none of those factors weigh against them. *Id* at 5.

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contract rights and interests. Dkt. No. 254-2. The TAC indicates that this document was executed "following the Defendants' November 17, 2023 Motion to Dismiss Second Amended Complaint." Dkt. No. 253-2 at 8. The Trust was created in November 2019. Dkt. No. 253-1 ¶1.

The attached proposed Third Amended Complaint deleted only Count X, not Counts IV, V, and X that the Plaintiffs asserted in their motion they were deleting. Dkt. No. 253 at 1, Dkt. Nos. 253-1, 253-2.

DISCUSSION

I. Legal Standard

"The threshold issue in resolving a motion to amend is the determination of whether the motion is governed by Rule 15 or Rule 16 of the Federal Rules of Civil Procedure." *Karlo v. Pittsburgh Glass Works, LLC*, No. 10-cv-1283, 2011 WL 5170445, at *2 (W.D. Pa. Oct. 31, 2011). Rule 15 states, in pertinent part, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The Court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "Rule 16, on the other hand, requires a party to demonstrate 'good cause' prior to the Court amending its scheduling order." *Karlo*, 2011 WL 5170445, at *2 (citing Fed. R. Civ. P. 16(b)(4)); *see also Premier Comp. Sols., LLC v. UPMC*, 970 F.3d 316, 319 (3d Cir. 2020) (holding that when a party moves to amend a pleading "after the deadline in a district court's scheduling order has passed, the 'good cause' standard of [Rule 16] applies," and a "party must meet this standard before a district court considers whether the party also meets Rule 15(a)'s more liberal standard."). A "Rule 16 analysis is mandatory and not permissive" whenever a party seeks leave to amend a pleading beyond the court's scheduling order. *Bolus v. Carnicella*, No. 15-01062, 2020 WL 7059632, at *2 (M.D. Pa. Dec. 2, 2020).

The Third Circuit has held that the moving party must show due diligence to demonstrate good cause under Rule 16. *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 84 (3d. Cir. 2010). "Relevant to the due diligence inquiry is whether the movant possessed, or through the exercise of reasonable diligence should have possessed, the knowledge necessary to file the motion to amend before the deadline expired." *Farrow v. U.S. Specialty Ins. Co.,* No. 20-cv-6588, 2023 WL 3496023, at *4 (D.N.J. May 17, 2023) (internal quotation marks omitted); *see also Konopca v. FDS Bank*, No. 15-cv-01547, 2016 WL 1228844, at *2 (D.N.J. Mar. 29, 2016) (holding that to demonstrate good cause, the movant must show that greater diligence was "impossible"). The good cause standard "is not a low threshold" because "[d]isregard for a scheduling order undermines the court's ability to control its docket, disrupts the agreed-upon course of the litigation, and rewards the indolent and cavalier." *Ortiz v. Stevenson*, No. 21-cv-17066, 2023 WL 6619674, at *3 (D.N.J. Oct. 11, 2023) (internal quotation marks omitted).

II. Application

As an initial matter, Plaintiffs have, once again, failed to comply with LRCi 7.1(f) that requires them to seek concurrence from opposing counsel regarding non-dispositive motions. This is far from the first time the Court has pointed out this failing to Plaintiffs' counsel, which would provide grounds to strike the motion out of hand. But the Court will exercise its discretion and review the motion on the merits.

In support of their motion, Plaintiffs have cited cases that have applied Rule 15's more lenient amendment standard. Dkt. No. 253 at 4-5. They mention that "good cause" exists to

grant their motion, but only in passing and only in reference to Rule 15 case law providing that cases should be resolved on their merits rather than on a pleading technicality, *id.* at 4, which does not address the diligence inquiry at the heart of the good cause analysis.

The instant motion to amend is the second time the Plaintiffs have sought to address the capacity under which they have brought suit. Defendants, apparently from the onset of the case, have raised questions of Plaintiffs' standing as Trustees to bring the majority of their claims. *See* Dkt. No. 102 at 10 (Defendants claimed that "their counsel identified as a dispositive issue 'early in the litigation' that Trustees did not possess claims for breach of contract, breach of implied warranty, fraud or misrepresentation, unjust enrichment, debt, and/or negligence." (citing Dkt. No. 90 at 6-9)). But by the time Plaintiffs filed their first motion to amend to allow the Hoffmans to sue in their individual capacities—their recognition that suing as Trustees presented a problem in asserting their claims—sixteen months had passed from the point they initiated the lawsuit, which this Court concluded was an undue delay under Rule 15—a resolution affirmed by the District Court. The current motion to amend essentially repackages Plaintiffs' earlier motion to amend that sought to allow the Hoffmans to sue the Defendants individually. But instead of changing the capacity in which they were bringing suit, thereby providing them with standing to assert many of their claims, they approach that goal from another angle by arguing that an assignment of the Hoffmans' individual rights to the Trust—based on a document executed in November 2023—provides the requisite standing. In other words, instead of the Hoffmans asserting

their individual rights themselves, the Trust would uphold those same individual rights through the belated assignment.

Plaintiffs ignore the significant fact that the standing problem has been extant since the beginning of this case. Now—41 months after the original complaint was filed and six months after briefing on *Plaintiffs'* motion for partial summary judgment has been completed—the Hoffmans seek once again to be able to sue to vindicate their individual rights, by pointing to a new document they believe will address their standing problem. This begs the question: if the Court held in December 2022 that Plaintiffs were too late under Rule 15 in seeking to amend to sue in their individual capacities, thereby providing the requisite standing, how could they possibly argue that, in September 2024, they exercised the necessary "due diligence" under the more stringent Rule 16 standard in addressing the same standing issue?[3]

The answer is self-evident. In their instant motion, Plaintiffs point to the District Judge's September 2024 opinion as having brought the standing issue to their attention, and what they would have to plead to assert standing as Trustees (that they did not plead), which they included in the proposed TAC—that the Hoffmans assigned their rights to the Trust. But even in their motion, Plaintiffs complain that they thought their allegations in the SAC

[3] Thus, their citation to *Animal Sci. Prods.*, 34 F. Supp. 3d at 516, is inapposite. There, the district court dismissed for lack of standing, but did so without prejudice, holding that the standing issue was being raised for the first time and plaintiffs should be permitted to attempt to remedy the standing deficiency. Here, standing was raised by Defendants in the first motion to amend, indicating that the Hoffmans ability to assert claims as Trustees was a significant issue in many of the claims going forward—an issue that Plaintiffs recognized when seeking to amend to allow them to assert their rights individually.

addressing the matter were sufficient, and blame the District Judge for "disregard[ing]" Virgin Islands case law in holding that they failed to do so. In other words, the ostensible reason for Plaintiffs' renewed effort to amend has to do with their understanding of the law that governed what they would have to plead, which the District Judge ruled was incorrect. It was not prompted by some new fact, for example, that they learned over the course of discovery.

Nor was their motion prompted by change in the governing law. Principles of third-party standing have been well established for decades. *See, e.g., Kowalski v. Tesmer*, 543 U.S. 125 (2004); *Franchise Tax Bd. of Calif. v. Alcan Aluminum, Ltd.*, 493 U.S. 331, 335-36 (1990). If Plaintiffs' counsel misapprehended the law on standing and believed the SAC sufficiently pleaded it, only to be proven wrong by the District Judge's Memorandum Opinion and Order, that does not qualify as due diligence under Rule 16. As the Supreme Court has observed, "Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action." *Bounds v. Smith*, 430 U.S. 817, 825 (1977), *abrogated on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996); *see also Peterkin v. Jeffes*, 855 F.2d 1021, 1038 (3d Cir. 1988) (same); *Drown v. Faillace*, No. 08-cv-2226, 2010 WL 4929257, at *7 (D.N.J. Nov. 29, 2010) ("[A] lawyer is expected to know and state settled law accurately."). In addition, as the district court observed in *Chancellor v. Pottsgrove School District*, 501 F. Supp. 2d 695 (E.D. Pa. 2007), "[c]arelessness, or attorney error . . . is insufficient to constitute 'good cause' under Rule 16(b)." *Id.* at 701-02 (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.

1992) ("[C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief [under Rule 16(b)]."). As the Ninth Circuit pointed out, "[f]ailing to heed clear and repeated signals that [there was a problem with the parties named in the complaint] does not constitute diligence." *Johnson*, 975 F.2d at 609.

The text of the assignment provides that the Hoffmans "certify and confirm" that, upon the creation of the Trust (in November 2019, Dkt. No. 114 ¶ 1), they assigned all of their rights in any causes of action to the Trust, and that the Trust was authorized to take any and all actions with regard to the Trust property, including bringing suit against Hammerhead and Rivera. Dkt. No. 254-2. But instead of providing a hook, as "new evidence" to support late amendment of the complaint, the assignment does the opposite. It makes crystal clear that over a year before Plaintiffs filed the lawsuit in May 2021, the Hoffmans as individuals had assigned their rights in this lawsuit to the Trust—and therefore bringing suit in their capacities as Trustees and not as individuals was a strategic decision. Equally apparent is the fact that counsel was charged with knowing what was required to properly plead standing in this situation, and he failed to do so not only in the Amended Complaint but the Second Amended Complaint. "[A] party is presumptively not diligent if, at the commencement of the lawsuit, the party knows or is in possession of the information that is the basis for that party's later motion to amend." *Chancellor*, 501 F. Supp. 2d at 702 (citing *S & W Enters., LLC v. SouthTrust Bank of Alabama, NA*, 315 F.3d 533, 536 (5th Cir. 2003) ("[T]he same facts were known to [the plaintiff] from the time of its original complaint to the time it moved for leave to amend."); *see also* *Kennedy v. City of Newark*, Civ. No. 10-cv-1405, 2011

WL 2669601, at *2 (D.N.J. July 7, 2011) ("The most common basis for finding a lack of good cause is the party's knowledge of the potential claim before the deadline to amend has passed.").

Accordingly, the Court concludes that Plaintiffs did not exercise the requisite due diligence under Rule 16(b)(4) that would support granting their motion to amend. The time for amending the pleadings has long passed in this three-and-one-half year old case. *See Little Pueblo Inn, LLC v. Willard Alonzo Stanback, P.C.*, No. 20-cv-11233, 2024 WL 623872, at *3 (D.N.J. Feb. 14, 2024) ("Rule 16's good cause standard seeks to fix the pleadings at some point in the proceedings. *See United States ex rel. McDermott v. Life Source Servs., LLC*, Civ. No. 19-cv-15360, 2023 WL 2238550, at *2 (D.N.J. Feb. 27, 2023) (citing, *inter alia*, Fed. R. Civ. P. 16(b), Advisory Committee's Note on 1983 amendment)."), *adopted*, 2024 WL 1604623 (D.N.J. Apr. 8, 2024); *Fermin v. Toyota Material Handling, U.S.A., Inc.*, No. 10-cv-3755, 2012 WL 1393074, at *6 (D.N.J. Apr. 23, 2012) (plaintiff has demonstrated "only a delayed analysis, not diligence.")

Because the Court is denying the motion to amend under Rule 16, it need not engage in an analysis under Rule 15. *See E. Minerals & Chems. Co. v. Mahan*, 225 F.3d 330, 340 (3d Cir. 2000) (affirming a district court's determination that a failure to satisfy the Rule 16 standard was sufficient to deny a motion to amend filed six months after the deadline for amendments to pleadings); *Joy v. Perez*, No. 10-01636, 2011 WL 221700, at *3 (D.N.J. Jan. 21, 2011) (holding "[b]ecause [p]laintiffs have not shown 'good cause' [under Rule 16], the Court

need not — and, in fact, cannot — proceed to an analysis of whether prejudice exists and whether to grant leave to amend the Complaint under Rule 15(a)").

However, the Court notes that Plaintiffs would not have satisfied the requisites of Rule 15 based upon the elements of undue delay and prejudice. *See Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000) (setting forth grounds that could justify a denial of leave to amend a pleading under Rule 15 such as undue delay, bad faith, dilatory motive, prejudice, and futility). As explained above, Plaintiffs knew about the legal and factual basis for suing in their capacity as Trustees (i.e., the assignment that was purportedly effective in November 2019) long before they filed the original complaint and years before the instant motion to amend and their September 2022 first motion to amend. The Court ruled that they had already engaged in undue delay when they filed that first motion to amend by not acting promptly to amend their pleading immediately in view of their knowledge. That conclusion applies with even greater force here, as Plaintiffs seek to amend long after their motion for partial summary judgment has been fully briefed. *See Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir.1993) (finding a three-year lapse between filing of complaint and proposed amendment an "unreasonable" delay). Allowing amendment would further delay the resolution of this dispute.

In addition, Defendants would be severely prejudiced by the amendment. They have argued for years that Plaintiffs as Trustees did not plead that they had standing, and to excuse Plaintiffs' incorrect legal premises and insufficient allegations to permit these six claims to go forward now would require Defendants to defend liability on claims that the

Court refused to permit years ago. And although Plaintiffs claim that no discovery will be needed, they do not explain that one-sentence conclusion (particularly as it may impact Defendants) and the Court doubts that would be the case.

Accordingly, it is hereby **ORDERED** that Plaintiffs' Motion to Amend, Dkt. No. 253, is **DENIED**.

ENTER:

Dated: October 24, 2024

/s/ Emile A. Henderson III
EMILE A. HENDERSON III
U.S. MAGISTRATE JUDGE