

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
ALBANY DIVISION**

|                               |   |                             |
|-------------------------------|---|-----------------------------|
| DISC DISEASE SOLUTIONS, INC., | : |                             |
|                               | : |                             |
| Plaintiff,                    | : |                             |
|                               | : |                             |
| v.                            | : | CASE NO.: 1:15-CV-188 (LJA) |
|                               | : |                             |
| VGH SOLUTIONS, INC.; DR-HO'S, | : |                             |
| INC.; HOI MING MICHAEL HO,    | : |                             |
|                               | : |                             |
| Defendants.                   | : |                             |
|                               | : |                             |

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**ORDER**

Before the Court are Plaintiff's Motion for Reconsideration (Doc. 21) and Motion to Alter or Amend Judgment, pursuant to Fed. R Civ. P. 59(e) (Doc. 22).<sup>1</sup> Plaintiff urges the Court to reconsider its Order (Doc. 19) dismissing the above captioned case for failure to state a claim. "A motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure may be granted on one of three grounds: An intervening change in controlling law, the availability of new evidence, and the need to correct clear error or prevent manifest injustice." *U.S. v. Amtreco, Inc.*, 858 F.Supp. 1189, 1190 (M.D. Ga. 1994); *see also Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) ("The only grounds for granting a Rule 59(e) motion are newly-discovered evidence or manifest errors of law or fact."). A Rule 59(e) motion cannot be used "to relitigate old matters, raise arguments or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).

Plaintiff argues that dismissing its complaint with prejudice is manifestly unjust because the abrogation of Form 18 constitutes an "intervening change in the law" and the

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<sup>1</sup> Plaintiff clarifies that it seeks the same relief in both Motions (Docs. 21, 22), but found it necessary to file the subsequent Motion to Alter or Amend Judgment for the purposes of appeal. (Doc. 22, at 1, n. 1).

Court's decision "prohibits Plaintiff from correcting alleged defects and pursuing its infringement claims on the merits." (Doc. 21 at 2). Plaintiff also argues that the Court failed to consider its request to file an amended complaint. *Id.* at 3-5.

Plaintiffs argue that the abrogation of Form 18 constituted an "intervening change in the law." Because, however, the abrogation took effect one day after Plaintiff's Complaint was filed and well before any briefing occurred, it does not constitute grounds for reconsideration. See *Pouyeh v. University of Alabama Department of Opthamology*, 66 F.Supp.3d 1375, 1379 (N.D. Ala. 2014) ("[Plaintiff] did not present an intervening change in the law; all the cases he cited were decided well before the original briefing."); *Carr v. Holloway*, 2010 WL 3937407, at \*2 (M.D. Ga. Oct. 1, 2010) (granting motion for reconsideration when the Eleventh Circuit entered an opinion affecting the relevant law two days after issuance of the District Court's Order). Furthermore, while the effective date of the abrogation was December 1, 2015, the rule change was adopted on April 29, 2015. Supreme Court of the United States, *Order Regarding Amendments to the Federal Rules of Civil Procedure* (Apr. 29, 2015), [https://www.supremecourt.gov/orders/courtorders/frcv15\(update\)\\_1823.pdf](https://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf). Thus, Plaintiff had notice of the change well before the Complaint was filed. "The motion for reconsideration is not an opportunity for a party to improve upon his arguments or to try out new arguments." *McCoy v. Macon Water Authority*, 966 F.Supp. 1209, 1223 (M.D. Ga. 1997). Accordingly, reconsideration is not warranted on the basis that there was an intervening change in the law.

Nor does a dismissal with prejudice create a manifest injustice requiring reconsideration. Although the Court did not explicitly state that the dismissal was with prejudice, dismissal with prejudice is appropriate when a matter is dismissed for failure to state a claim. *Cambell v. Air Jamaica*, 760 F.3d 1165, 1169 (11th Cir. 2014); *Bellamy v. First Class Management LLC*, 2016 WL 3093027, at \*5 (M.D. Fla. Apr. 22, 2016). Furthermore, as dismissal for failure to state a claim operates as "adjudication on the merits," the principles of res judicata apply. See F.R.C.P 41(b); *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990). Plaintiff was put on notice of the issue in Defendants' Motion to Dismiss and had the opportunity to address the effect of Form 18's abrogation prior to its briefing. However,

Plaintiff did not attempt to amend his Complaint or address the rule change between March 31, 2016, when Defendant raised the issue, and April 21, 2016, when it filed its opposition to the Motion to Dismiss. Thus, it is not unjust for the Court's Order to stand because Plaintiff failed to amend its complaint in a timely manner.

Furthermore, Plaintiff failed to file an appropriate Motion to Amend. The Court "is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Wagner v. Daewoo Heavy Industries America Corp.*, 314 F.3d 541, 542 (11th Cir. 2002); *see also Ball v. JPMorgan Chase Bank, N.A.*, 2014 WL 297907, at \*2 (M.D. Ga. Jan. 27, 2014). In *Wagner*, the Eleventh Circuit, sitting en banc, reasoned that, under a different rule, "a plaintiff could sit idly by as he awaited the district court's determination with respect to a Rule 12(b)(6) motion to dismiss" and be assured that "he would have two bites at the apple." *Wagner*, 314 F.3d at 543. The Eleventh Circuit found the rule it announced to be "more efficient and in line with the critically important concept of finality in our judicial system." *Id.*

Plaintiff's request to be allowed to amend its complaint was legally insufficient to constitute a motion and the Court was within its discretion to deny it *sub silentio*. Plaintiff's "request" consisted of the following language in a footnote: "In the event the Court finds that additional allegations are required related to any aspect of Plaintiff's claims (it should not), Plaintiff respectfully requests leave of Court to amend its complaint." (Doc. 9, at 13, n. 1). Federal Rule of Civil Procedure 7(b)(1) provides that "a request for a court order must be made by motion." Furthermore, "the motion must be in writing unless made during a hearing or trial; state with particularity the grounds for seeking the order; and state the relief sought." F.R.C.P. 7(b)(1). Local Rule 7.1 provides that "every motion filed in a civil proceeding shall be accompanied by a memorandum of law citing supporting authorities." The Eleventh Circuit has long held that "a motion for leave to amend should either set forth the substance of the proposed amendment or attach a copy of the proposed amendment." *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999). Plaintiff did neither. In *Perlman v. Bank of America, N.A.*, the Eleventh Circuit rejected a similar argument, holding, "the footnote in

which Mr. Perlman sought leave to amend- contained in his opposition to Bank of America's motion to dismiss- did not indicate what additional facts he intended to allege in a proposed second amended complaint. The request was therefore legally insufficient." 561 Fed.Appx. 810, 814 (11th Cir. 2014). Likewise, here, Plaintiff's cursory request neither set forth the substance of a proposed amendment, nor attached a proposed amended complaint. Thus, it was legally insufficient.

The Court has discretion to deny a legally insufficient request for leave to amend contained in opposition to a motion to dismiss *sub silentio*. See *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1361-62 (11th Cir. 2006) ("[T]he request for leave to amend was included in a memorandum the plaintiff filed in opposition to the defendants' motions to dismiss the complaint... [W]e affirm the district court's rejection thereof because it failed to include the proposed amendment or the substance thereof as required by *Long*."); *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009) ("When the shareholders requested leave to amend their complaint in a footnote to their brief in opposition to the defendants' motion to dismiss, it was within the discretion of the district court to deny that request *sub silentio*."); *Long*, 181 F.3d at 1280-81 ("The plaintiff had ample time to file a motion for leave to amend but failed to do so. Failure to properly request leave to amend, when she had adequate opportunity and time to do so, precludes the plaintiff's argument on appeal that the district court abused its discretion by denying her leave."). As such, the Court did not commit a clear error of law, nor did the failure to allow Plaintiff to amend create a manifest injustice.

As Plaintiff has not established that there was a qualifying intervening change in the law, has not presented new evidence, or established that the Court's order contained a clear error of law or will cause manifest injustice, Plaintiff's Motion for Reconsideration (Doc. 21) and Motion to Alter or Amend Judgment (Doc. 22) are **DENIED**.

**SO ORDERED**, this 12th day of December, 2016.

/s/ Leslie J. Abrams  
**LESLIE J. ABRAMS, JUDGE**  
**UNITED STATES DISTRICT COURT**