

No. 13-41

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IN THE  
**Supreme Court of the United States**

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VON DREHLE CORPORATION,

*Petitioner,*

*v.*

GEORGIA-PACIFIC CONSUMER PRODUCTS LP,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit**

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**BRIEF IN OPPOSITION**

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## **QUESTION PRESENTED**

After more than six years of litigation culminating in a full-blown jury trial, respondent Georgia-Pacific Consumer Products LP prevailed on its claims that petitioner von Drehle Corp. had infringed and was continuing to infringe Georgia-Pacific's trademarks. Only then, after the jury's verdict, did the district court allow von Drehle to amend its answer to assert new defenses of claim and issue preclusion, and, based on those defenses, the district court vacated the verdict. The same court had twice rejected von Drehle's attempts to raise those defenses before trial, finding that the defenses were untimely and that allowing von Drehle to assert them would unfairly prejudice Georgia-Pacific. The court of appeals held that von Drehle had waived its preclusion defenses and that, in the circumstances of this case, allowing a defendant to assert new defenses after a trial on the merits was an abuse of discretion.

The question presented is whether the court of appeals correctly held that the district court abused its discretion by discarding a jury verdict based on preclusion defenses that the court had repeatedly rejected before trial as untimely and prejudicial.

**STATEMENT REGARDING PARTIES TO THE  
PROCEEDING AND RULE 29.6 STATEMENT**

Although named in the petition (at ii) as a respondent, Georgia-Pacific Corporation was not a party to the appeal in the Fourth Circuit; that entity no longer exists, and was replaced as the plaintiff in this case by Georgia-Pacific Consumer Products LP in 2007. *See* E.D.N.C. Dkt. #149. Georgia-Pacific Consumer Products LP is the sole respondent in this Court.

Respondent Georgia-Pacific Consumer Products LP is not a publicly held corporation and has no immediate parent corporation. The ultimate, indirect parent of Georgia-Pacific Consumer Products LP is Koch Industries, Inc. No publicly held company owns 10 percent or more of the stock of Georgia-Pacific Consumer Products LP or Koch Industries, Inc.

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## **BRIEF IN OPPOSITION**

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Respondent Georgia-Pacific Consumer Products LP (“Georgia-Pacific”) respectfully submits that the petition for a writ of certiorari should be denied.

### **OPINIONS BELOW**

The court of appeals’ opinion (Pet. App. 1a-19a) is reported at 710 F.3d 527. The court of appeals’ order denying rehearing (Pet. App. 77a-78a) is not reported. The relevant opinion of the district court (*id.* at 20a-30a) is reported at 856 F. Supp. 2d 750.

### **JURISDICTION**

The court of appeals issued its opinion and judgment on March 14, 2013, Pet. App. 1a, and denied von Drehle’s petition for rehearing or rehearing en banc on April 9, 2013, *id.* at 77a. The petition for a writ of certiorari was filed on July 8, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

### **STATUTORY PROVISIONS INVOLVED**

Pertinent provisions of Federal Rules of Civil Procedure 8, 15, and 16 are reproduced in the Appendix to this Brief in Opposition (“BIO App.”) at 18a.

### **STATEMENT**

Petitioner von Drehle Corp. is so convinced that *something* in this case must merit certiorari that pinning down a particular legal issue that warrants review seems almost an afterthought. That is no accident. von Drehle well knows that this is a fact-bound case about waiver. *All* the Fourth Circuit held is that, in the circumstances of this case, von Drehle knowingly abandoned any preclusion defenses it

might have had by intentionally failing to plead those defenses on time, and that the district court could not allow such untimely defenses *after* a full-blown jury trial that resulted in a verdict for Georgia-Pacific. von Drehle’s various formulations of the issue tendered for review—from the singular, serpentine question presented, to its trio of supposed circuit splits, to its portrayal elsewhere of one “overall and fundamental conflict” buttressed by several lesser “subsidiary conflicts” (Pet. 4)—all are efforts to obscure this factbound ruling, in the hope of burying the absence of any cert.-worthy conflict over *any* important principle of federal law beneath grandiose descriptions of an epic struggle for the soul of American justice. *See, e.g.*, Pet. 28.

Not even the petition’s theatrics, however, can conceal the key fact that the court of appeals here did not decide any important legal question at all, much less in a way that conflicts with any other circuit. The Fourth Circuit’s decision did not create or deepen any divide on any question of federal procedure, preclusion doctrine, or trademark law. Indeed, all it decided was that (1) the district court was right when it rejected—twice—von Drehle’s attempts before trial to raise long-abandoned preclusion defenses, especially because injecting them into the case would prejudice Georgia-Pacific and render the federal courts’ time and effort to date an unmitigated waste; and (2) the district court was wrong to throw out a jury verdict against von Drehle based on the same preclusion defenses, without so much as addressing its own prior, well-grounded findings of undue delay and prejudice.

That one-off, factbound conclusion is the sum-total of the court of appeals’ actual holding—though

the court’s express indication that it would reach the same result on other, independent grounds only confirms that it merits no more of this Court’s overtaxed time. von Drehle’s efforts to spin the decision below into a watershed ruling upending decades of settled law cannot be squared with the opinion or existing law. The Fourth Circuit did not pronounce any new rule of law for leave to amend pleadings or appellate review of leave-to-amend decisions. It hardly could have done so, since the standards von Drehle advocates and claims are followed elsewhere are *already* entrenched in Fourth Circuit precedent—a fact von Drehle neglects to mention.

Likewise, the court below made no new law, much less opened a nationwide rift, regarding sua sponte application of preclusion under *Arizona v. California*, 530 U.S. 392 (2000). The suggestion that review is needed to clarify a purported circuit conflict over the correct reading of *Arizona* should surprise even von Drehle, which—as the Fourth Circuit noted—did not think that case important enough to *cite*. Pet. App. 17a n.12. Moreover, by von Drehle’s own admission (Pet. 21), the court of appeals did *not* foreclose the possibility that “special circumstances” beyond the one enumerated in *Arizona*, 530 U.S. at 412, might exist. The court left that issue for another day because, as it explained, von Drehle did not even *argue* that any such circumstance was present here.

von Drehle’s final, “most fundamental reason” for seeking review, Pet. 15—curiously buried at the end, *id.* at 25-28—does not even purport to present a specific legal question, but asks the Court to straighten out a supposed inconsistency in the results of this case and others involving different defendants. But

in reality there is no conflict to resolve. The alleged inconsistency merely reflects von Drehle’s own deliberate decision not to timely press its purported preclusion defenses. That a different defendant, in different circumstances, timely asserted analogous defenses with success scarcely impeached the Fourth Circuit’s ruling that von Drehle slept on whatever rights it might have had. By sitting on its putative rights, von Drehle forfeited those defenses, and in doing so assumed the risk that it would lose (as it did) on the merits. It thus is not the federal courts von Drehle seeks to save from “embarrassment” (Pet. 15, 28), but itself.

The petition should be denied.

1. Georgia-Pacific is a leading manufacturer of paper towels and dispensers for the “away-from-home” market—*i.e.*, public venues such as hotel and restaurant restrooms. Pet. App. 32a. This case involves an innovative product line—Georgia-Pacific’s enMotion® hands-free paper-towel dispensing system—that it developed after years of research and tens of millions of dollars of investment, C.A. Joint Appendix (“J.A.”) 1017, to fill a major market need. Conventional dispensers pose serious risks of cross-contamination and can yield enormous paper-towel waste. And mechanical dispensers often prove unreliable. J.A. 868-69. enMotion® provided a solution. The original system consists of an electronic, hands-free dispenser with a sophisticated motion sensor, which automatically provides a pre-measured length of a high-quality towel. Pet. App. 35a; *see* BIO App. 22a (photograph of enMotion® dispenser). When introduced in 2002, enMotion® was unique in the market. Pet. App. 35a. In the decade since, it has been an unqualified success, offering reliability and hy-

gienic, efficiency, and environmental benefits that most competing systems cannot match. *Ibid.*; J.A. 871-77. Georgia-Pacific has since expanded the line to include more than a dozen dispensers for towels, soap, and hand sanitizer, some tailored to particular industries or settings. J.A. 891-92, 1013.

To safeguard its substantial investment and hard-earned goodwill, Georgia-Pacific secured trademark protection for the enMotion® brand. Each dispenser and every box of towels bears several federally registered enMotion® and Georgia-Pacific trademarks. Pet. App. 35a. Those trademarks would be worthless, however, if the enMotion® system were misused: Its success depends on the *combination* of the dispenser's advanced technology *and* the high-quality paper towel Georgia-Pacific specially developed for the purpose. J.A. 873. If refilled with the wrong paper, the system may not deliver the reliable performance it was painstakingly engineered to achieve, and users would think poorly of enMotion®. J.A. 870-74, 898. Georgia-Pacific thus took several further steps to prevent the tarnishing and dilution of its brand—including designing enMotion® to use a unique towel size, J.A. 886-87, and leasing its machines to distributors (instead of selling them), requiring as a lease condition that only authentic enMotion® towels be used. J.A. 878-79, 883-85, 1206. The sub-lessee's hands, however, are not tied. If it prefers not to use genuine enMotion® towels, it can return the dispenser without penalty. J.A. 879.

2. von Drehle is a competing manufacturer of paper-towel products. Pet. App. 37a. In 2004, after learning of enMotion®, von Drehle developed a scheme to free-ride on Georgia-Pacific's successful

but costly innovation. It obtained an enMotion® dispenser and designed a cheap substitute towel for use in place of authentic enMotion® paper, J.A. 831—a practice called “stuffing,” Pet. App. 38a n.3. The towel von Drehle developed, the “810-B,” was admittedly tailor-made for that purpose. J.A. 831-32, 1004, 1121. Indeed, when first introduced, the 810-B could be used only in enMotion®, since no other system could accommodate its size. Pet. App. 35a; J.A. 1004. von Drehle actively marketed the 810-B specifically for stuffing in enMotion® units, referring to it as “the enMotion towel.” Pet. App. 37a-38a. For years afterward, von Drehle undisputedly knew that every roll it sold was destined for stuffing in an enMotion® dispenser. *Id.* at 38a.

von Drehle’s knock-off towel found a market, but cutting corners came at a cost. von Drehle began receiving complaints about the 810-B’s quality. J.A. 841-42, 1125. Rolls installed in enMotion® dispensers sometimes would not stay in place, J.A. 837-38, and von Drehle’s paper was less absorbent and not as soft, J.A. 838-39, 896-97. Those negative attributes threatened the reputation for quality that Georgia-Pacific had carefully cultivated for its enMotion® line. J.A. 897-98, 956, 974, 1017-18.

When Georgia-Pacific learned of von Drehle’s stuffing campaign, it immediately sent a cease-and-desist letter, reminding von Drehle that selling its towels for stuffing in enMotion® dispensers infringed Georgia-Pacific’s trademarks and induced breaches of Georgia-Pacific’s leases. J.A. 846-48, 1170-71. von Drehle refused to end its profitable infringement, J.A. 846-850, 1172-73, claiming that its conduct was lawful; it also claimed to have developed its own dispenser that could accommodate the 810-B towel.

J.A. 1172. But that “dispenser,” which it dubbed the “28810,” was nothing more than a metal pipe bolted to a crude, makeshift wood base. J.A. 849. It was assembled by an employee’s father who simply “went to Home Depot and got some parts and took [a] pipe and put it on a wooden stand and called it a dispenser.” *Id.*; see BIO App. 23a (photograph of “28810”). Needless to say, the “28810” was not a best-seller. von Drehle’s own president admitted that the “28810” is not in use *anywhere*: von Drehle never sold a single unit, nor even gave one away. J.A. 832, 1001.

3. Faced with von Drehle’s refusal to cease its infringement, Georgia-Pacific filed this lawsuit in the Eastern District of North Carolina in 2005, seeking to stop the infringement at the source. Pet. App. 4a. Its complaint alleged contributory trademark infringement and unfair competition under the federal Lanham Act, 15 U.S.C. §§ 1114(1), 1125(a), and various state-law claims not at issue here, and sought an injunction barring continued infringement and damages for past injuries. Pet. App. 4a.<sup>1</sup>

The parties filed cross-motions for summary judgment, which the district court initially denied in March 2008. Pet. App. 5a. More than a year later, however, in April 2009, the court unexpectedly convened a hearing and announced that it was reconsidering its ruling. *Ibid.* After an impromptu oral argument, the court indicated that it would issue a new decision soon. J.A. 194.

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<sup>1</sup> von Drehle counterclaimed, alleging federal antitrust and state-law unfair-competition claims, J.A. 215, which are not at issue.

4. Meanwhile, because delays in this case foreclosed any prospect of prompt relief, and Georgia-Pacific risked claims of trademark abandonment, in 2008 and 2009 it sued several distributors that sold von Drehle's 810-B towels for stuffing in enMotion® dispensers. It filed one suit in the Western District of Arkansas against Myers Supply, Inc., a local janitorial supplier serving the Little Rock and Hot Springs markets.<sup>2</sup> It filed another in the Northern District of Ohio against Four-U-Packaging, Inc., a local distributor serving northern Ohio and north-eastern Indiana.<sup>3</sup>

The suit against Myers in Arkansas proceeded quickly. The Arkansas court granted summary judgment against certain of Georgia-Pacific's claims. And after a two-day bench trial, it entered judgment for Myers on July 23, 2009, finding that Myers' stuffing of von Drehle's towels in enMotion® dispensers did not constitute trademark infringement. *Myers*, 2009 WL 2192721, at \*1, \*8-9; J.A. 569.

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<sup>2</sup> *Georgia-Pacific Consumer Prods. LP v. Myers Supply, Inc.*, 2009 WL 2192721 (W.D. Ark. July 23, 2009), *aff'd*, 621 F.3d 771 (8th Cir. 2010).

<sup>3</sup> *Georgia-Pacific Consumer Prods. LP v. Four-U-Packaging, Inc.*, 821 F. Supp. 2d 948 (N.D. Ohio 2011), *aff'd*, 701 F.3d 1093 (6th Cir. 2012). Georgia-Pacific sued another distributor in Ohio and one in Nevada, but has moved voluntarily to dismiss both cases. *Georgia-Pacific Consumer Prods. LP v. Superior Janitor Supply, Inc.*, 2011 WL 4002563 (S.D. Ohio Sept. 8, 2011); Mot. to Dismiss, *Superior*, 2011 WL 4002563 (S.D. Ohio Apr. 1, 2013) (Dkt. #71); *Georgia-Pacific Consumer Prods. LP v. Inland Supply Co.*, No. 09-246 (D. Nev. May 15, 2013) (Dkt. #47). A suit against a Tennessee distributor was settled in 2008. *Georgia-Pacific Consumer Prods. LP v. A&W Office Supply, Inc.*, No. 08-204 (E.D. Tenn. July 22, 2008) (Dkt. #8).



5. von Drehle was aware of the *Myers* ruling, and its counsel knew of potential claim and issue preclusion defenses based upon it. Two of its attorneys attended the *Myers* trial. And just eleven days after the *Myers* decision, one of those attorneys filed a pleading in the *Four-U* case asserting an issue-preclusion defense based on *Myers*.<sup>4</sup> Yet in this case, von Drehle elected not to raise any preclusion argument for well over a year. When *Myers* was decided in July 2009, the district court here was still reconsidering whether to grant summary judgment for von Drehle. Pet. App. 13a. von Drehle, however, neither alerted the district court to the *Myers* decision, nor even sought leave to brief any preclusion defenses. The district court thereafter reversed its earlier ruling and entered summary judgment for von Drehle on Georgia-Pacific's claims.

Georgia-Pacific appealed to the Fourth Circuit, J.A. 216, where von Drehle again asserted no preclusion defenses. Indeed, although von Drehle discussed *Myers* in its brief and at oral argument, it did *not* argue that *Myers* gave rise to any preclusion defense that supplied an alternative basis for affirmance. Pet. 11. Instead, von Drehle invited the court of appeals, like the district court, to decide the underlying trademark-law merits.

The court of appeals did so and overturned the district court's summary-judgment ruling in August 2010. Pet. App. 31a. The court rejected von Drehle's contention that only confusion among distributors

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<sup>4</sup> See Am. Answer 6-7, *Four-U*, 821 F. Supp. 2d 948 (No. 09-1071) (Aug. 3, 2009) (Dkt. #10) (pleading asserting preclusion based on *Myers*, signed inter alia by Albert P. Allan, counsel for von Drehle from July 2005 to June 2013).

and end-users who *purchased* 810-B towels is relevant to the trademark-infringement likelihood-of-confusion inquiry; instead, it followed long-settled precedent holding that post-purchase “confusion among the non-purchasing public” is relevant if it “will adversely affect the plaintiff’s ability to control [its] reputation.” *Id.* at 49a (citation omitted). The Fourth Circuit further held that the evidence was sufficient to support a finding of trademark infringement—notwithstanding von Drehle’s contention that stuffing is accepted in the industry—and it remanded the case for trial. *Id.* at 51a-55a.

6. In November 2010—months after the Fourth Circuit remanded the case, and more than 480 days after *Myers* was decided—von Drehle attempted for the first time to raise claim and issue preclusion defenses based on *Myers*. Pet. App. 6a-7a. The district court refused that request, finding that von Drehle knew of *Myers* since its issuance, yet had never asserted preclusion, and instead litigated the merits for more than a year. *Id.* at 8a-9a; BIO App. 7a-8a. von Drehle, the court determined, offered “no justifiable reason for its delay,” and allowing it to inject new defenses so late in the case—which was “finally ready for trial” after nearly six years of litigation—“would prejudice [Georgia-Pacific],” given the “considerable time, energy, and resources” it had spent litigating the case, “not to mention the efforts of [the district court] and ... the Fourth Circuit.” BIO App. 8a. “von Drehle,” the court concluded, “cannot now be rewarded after it wasted the time and money of [Georgia-Pacific] and the justice system.” *Ibid.* von Drehle sought reconsideration, but the district court reaffirmed its decision. *Id.* at 12a-14a.

Unlike von Drehle, the defendants in Georgia-Pacific's other suits timely raised certain preclusion arguments based on the Arkansas judgment. In September 2011, the Southern District of Ohio held in *Superior* that the Arkansas judgment did *not* have issue-preclusive effect in the case before it. 2011 WL 4002563, at \*2-5. Two months later, the Northern District of Ohio reached the opposite conclusion in *Four-U*. Seizing on the *Four-U* ruling, von Drehle again asked the district court here to let it assert claim and issue preclusion defenses and to grant summary judgment based upon them. Pet. App. 9a-10a. The district court did not rule on those motions before trial, expressing doubt whether the Fourth Circuit's earlier mandate left it any room to derail the trial. J.A. 779.

7. Trial finally commenced in January 2012. After brief deliberations, the jury returned a verdict for Georgia-Pacific. Pet. App. 10a. Finding that von Drehle "infringed on [Georgia-Pacific's] valid trademark," it awarded damages dating back to Georgia-Pacific's 2005 cease-and-desist letter. *Id.* The district court entered judgment accordingly. J.A. 1226.<sup>5</sup>

Two months after trial, however, the district court unexpectedly granted von Drehle's motion for judgment as a matter of law based on the same preclusion defenses it had previously held untimely. Notably, the court did *not* revisit its prior findings that allowing von Drehle to assert preclusion after having withheld the defenses for so long was unjustified and would prejudice Georgia-Pacific. Pet. App.

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<sup>5</sup> von Drehle initially indicated that it would challenge the sufficiency of the evidence on appeal, but it later dropped that challenge. See C.A. Reply 3.

24a-25a. Instead, the district court curiously explained that because von Drehle promptly brought the *Four-U* decision to the court's attention, von Drehle should be permitted to assert preclusion based on *Myers*. *Ibid.* In the alternative, the court concluded that it could invoke claim and issue preclusion sua sponte. *Id.* at 25a.

8. Georgia-Pacific appealed, and the Fourth Circuit again overturned the district court's decision. Pet. App. 1a-19a. The court of appeals first held that von Drehle had waived its purported preclusion defenses based on *Myers* by holding them back for well over a year after they arose, despite knowing of their existence. *Id.* at 11a-16a. Relying on Federal Rule of Civil Procedure 8(c)(1), this Court's decisions in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), and *Arizona*, 530 U.S. 392, and a long line of other circuit courts' decisions, the court explained that "claim preclusion and issue preclusion are affirmative defenses that must be pleaded," and are deemed waived where a party "wait[s] too long to assert the defense after it becomes available." Pet. App. 12a. von Drehle, the court held, had done exactly that here. Although it knew immediately of the *Myers* decision, it had raised no preclusion arguments for more than 480 days afterward—not in the three weeks after *Myers* was decided before the district court ruled, not on appeal as an alternative ground for affirmance, and not for several months after the case was remanded. *Id.* at 13a-14a.

Given those circumstances, the court of appeals concluded that the district court erred by allowing von Drehle to amend its pleadings to add new defenses *after* trial. Pet. App. 14a-15a. The district

court's own earlier findings of undue delay and prejudice amply supported denying leave to amend. *See id.* at 14a. Yet the district court abruptly changed positions *without* revisiting those findings. *Id.* at 14a-15a. And as the Fourth Circuit explained, the only explanation the district court gave—the recent *Four-U* decision—was entirely irrelevant. *Four-U* did not give rise to any new preclusion defense; the Ohio court had simply decided that *Myers* had preclusive effect in *Four-U*. *See ibid.* The *Four-U* ruling and von Drehle's prompt request for leave to amend in its wake thus had no bearing. The district court's decision to allow von Drehle to raise previously forbidden defenses after the verdict solely because of *Four-U* was therefore “arbitrary” and an abuse of discretion. *Id.* at 15a.

The court of appeals further held that the district court's alternative rationale, invoking preclusion sua sponte, was also erroneous. This Court's decision in *Arizona*, the Fourth Circuit recognized, permits sua sponte application of preclusion only in “special circumstances.” Pet. App. 16a (quoting 530 U.S. at 412; other citation omitted). But the only such circumstance *Arizona* itself identified—where a court discovers that it has already decided an issue and can conserve judicial resources by invoking preclusion—“plainly was not present here.” *Id.* at 17a. Considering preclusion sua sponte after the verdict here, in fact, “actually wasted judicial resources, rather than sparing them.” *Ibid.* And “von Drehle ha[d] not identified any other ‘special circumstance’ justifying the district court's unusual action”; indeed, it did not even *cite Arizona* in its brief or “otherwise respond” to Georgia-Pacific's arguments that no “special circumstances” were present here. *Id.* at 17a & n.12.

In addition to rejecting both grounds the district court gave for its ruling, the court of appeals also concluded that the district court's decision contravened the mandate rule, by "fail[ing] to 'implement both the letter and spirit'" of the Fourth Circuit's mandate in the earlier appeal. Pet. App. 17a-18a n.13 (citation omitted). The court of appeals' prior decision required the district court to let the *jury* decide the merits of Georgia-Pacific's trademark-infringement claims, but the district court improperly "took this issue away from the jury" by vacating the verdict based on supposed preclusion defenses that became available to von Drehle years earlier. *Ibid.* The Fourth Circuit accordingly vacated the district court's decision and remanded with instructions to reinstate the verdict and consider Georgia-Pacific's request for an injunction. *Id.* at 18a-19a.

von Drehle sought panel and en banc rehearing, advancing many of the same allegations of circuit conflicts it raises here. C.A. Pet. for Reh'g 5-15. No judge requested a poll. Pet. App. 77a. von Drehle also sought a stay of the Fourth Circuit's mandate pending review in this Court, pressing the same arguments. C.A. Mot. to Stay Mandate 4-15. The court of appeals denied that motion. BIO App. 1a-2a.<sup>6</sup>

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<sup>6</sup> On remand in the district court, Georgia-Pacific renewed its motion for a permanent injunction to bar further infringement of its trademarks. After further briefing and a hearing, the district court granted the injunction. E.D.N.C. Dkt. #406. Based on the jury's verdict and its own review of the evidence showing that von Drehle intentionally infringed Georgia-Pacific's marks, the district court awarded treble damages, attorney's fees, and prejudgment interest. *Ibid.* von Drehle has separately appealed that ruling.

### REASONS FOR DENYING THE PETITION

von Drehle's petition meets none of this Court's criteria for granting certiorari. The Fourth Circuit did not decide any legal question of broad significance, let alone in a way that contradicts any other circuit's precedent. It simply applied settled, well-accepted principles to the peculiar circumstances of this case, holding that von Drehle waived its purported preclusion defenses—by deliberately declining to press them for well over a year after they arose—and that neither the Federal Rules nor the district court's limited authority to invoke preclusion *sua sponte* entitled von Drehle to a re-do after it lost on the merits at trial. von Drehle cannot identify any case that conflicts with that narrow, case-specific conclusion. And its contention that the result here is inconsistent with the outcomes of other cases involving distributors of von Drehle's infringing product ignores fundamental differences in the facts of each case and the distinct questions each court addressed.

At bottom, von Drehle seeks factbound error correction where there is no error to correct. The Fourth Circuit's determination that the district court abused its discretion by arbitrarily abandoning its own earlier findings of undue delay and prejudice is plainly correct. The district court not only failed to consider relevant factors—it failed to consider facts it *itself* had previously found and deemed relevant. The court of appeals was also correct that invoking preclusion *sua sponte* was counterproductive here. This Court has instructed lower courts not to invoke preclusion arguments parties have not raised except in rare cases where it is essential to achieve preclusion's core purposes—such as enhancing judicial efficiency. Here invoking preclusion *after* the verdict

would defeat rather than promote those ends, needlessly rendering already-expended efforts of the federal courts a waste.

Review in this case is especially unwarranted because it is an exceedingly poor vehicle to address any of the issues von Drehle presents. Indeed, the court of appeals made clear that it would have reached the same result on an additional, independent ground, which von Drehle does not suggest merits certiorari.

**I. VON DREHLE’S ALLEGED CIRCUIT SPLITS ARE ILLUSORY.**

von Drehle’s bid for certiorari rests on its claim that the decision below created three distinct circuit splits. Pet. 16-28. Each of those alleged conflicts, however, is nonexistent. The Fourth Circuit did not adopt any new rule of law governing leave to amend pleadings, the degree of deference owed to district-court decisions granting or denying leave, or federal courts’ sua sponte invocation of claim and issue preclusion. Indeed, Fourth Circuit precedent already aligns with the standards von Drehle advocates, and the decision below did not depart from any of those principles. There is no genuine split, and no need for this Court’s intervention.

A. von Drehle first argues that the decision below conflicts with a tangled hodge-podge of lower-court cases that variously concern the standard for permitting amendments to pleadings or the standard of appellate review of decisions granting or denying leave to amend. Pet. 16-21. Its claim is false on both fronts. von Drehle fails to grapple with existing Fourth Circuit precedent that *already* reflects the standards it advocates, and it badly mischaracterizes the ruling the court of appeals actually rendered.



1. von Drehle’s claim that the Fourth Circuit now follows a different and more stringent standard regarding when to allow out-of-time amendments to pleadings (Pet. 18) disregards that court’s prior holdings and distorts its decision here. von Drehle contends that other courts embrace a “liberal pleading philosophy” and “require that the district court grant a Rule 15(a) motion” unless the amendment would cause “prejudice to the non-movant” or the request for leave to amend reflects “undue delay, bad faith, or dilatory motive.” *Id.* at 17-18 (internal quotation marks omitted). von Drehle neglects to mention, however, that the Fourth Circuit *also* follows the *same standard*, which it applied here.

Omitted from the petition’s lengthy string-cites is the court of appeals’ en banc decision in *Laber v. Harvey*, 438 F.3d 404 (4th Cir. 2006) (en banc), on which the panel below expressly relied, Pet. App. 11a, and which makes clear that the Fourth Circuit employs the same “liberal rule” as its siblings. 438 F.3d at 426. In the Fourth Circuit, as elsewhere, “leave to amend a pleading should be denied only when” factors such as “prejudic[e] to the opposing party,” “bad faith” by the movant, or futility counsel against allowing the amendment, *ibid.* (internal quotation marks omitted)—the very same factors von Drehle claims other courts deem dispositive, *see* Pet. 17-19. And like those other circuits, the Fourth Circuit deems “[d]elay alone ... an insufficient reason to deny” leave to amend—in some circumstances, even after judgment. *Laber*, 438 F.3d at 427.

*Laber* obliterates any argument that certiorari is needed to bring the Fourth Circuit back into the fold. The panel here did not announce any new leave-to-amend test, but even had it done so, its pronounce-

ment would be a nullity going forward. One Fourth Circuit panel cannot overrule another, *see MLC Auto., LLC v. Town of S. Pines*, 532 F.3d 269, 278 (4th Cir. 2008), much less an earlier en banc ruling. The test articulated in *Laber* thus remains binding circuit precedent. The “divergen[ce]” of legal standards alleged by von Drehle (Pet. 20) is a fantasy.

von Drehle is thus left to argue that the court of appeals “fail[ed] to apply” the settled standard in this case. Pet. 18. Even if that were true, it would amount at most to an *intra*-circuit conflict plainly undeserving of certiorari. *See, e.g., Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the Fourth Circuit panel did not depart from that established rubric here.<sup>7</sup>

Quite the opposite—the Fourth Circuit faulted the district court for *failing* to apply that test properly to facts that the district court itself had previously found. Before trial, the district court had twice determined that “von Drehle ha[d] unduly delayed in amending its Answer” and “provided no justifiable reason for its delay,” and that allowing von Drehle’s proposed amendments “would prejudice [Georgia-Pacific],” which had “expended considerable time, energy, and resources litigating this case” on the merits. Pet. App. 8a (emphases omitted) (quoting BIO App. 7a-8a). After the jury returned its verdict,

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<sup>7</sup> As discussed *infra* at 32-33, von Drehle had to meet an even higher standard here: Because it sought leave to amend after the deadline set in the scheduling order, it bore the burden of showing “good cause.” Fed. R. Civ. P. 16(b)(4). The decision below did not hold von Drehle to that higher bar, but were this Court to grant review, it would have to address Rule 16’s more stringent standard.

however, the district court inexplicably changed course and allowed the amendments—but *without* either “chang[ing] its initial conclusion that von Drehle’s delay was unjustified” or “revisit[ing] its earlier finding that Georgia-Pacific had been prejudiced by von Drehle’s delay.” *Id.* at 14a-15a. And the only rationale it offered—that von Drehle had promptly alerted the court to a ruling in a different case, *Four-U*, where the defendant promptly asserted preclusion—was not only a non sequitur, but also had nothing to do with the analysis of prejudice, improper motive, or other criteria that von Drehle claims the court of appeals should have considered.

In short, it was the district court—not the Fourth Circuit—that parted ways from other federal courts by failing to account for the factors that von Drehle says should be paramount. Pet. 17-19. There is thus no conflict between the cases von Drehle cites emphasizing the importance of those criteria and the court of appeals’ decision vacating the district court’s ruling for failing properly to analyze those factors.

2. Interspersed with von Drehle’s claims that the decision below changed the substantive leave-to-amend rubric are its repeated assertions that the court below adopted a new standard of appellate review for leave-to-amend rulings. Pet. 18-21. That variation is equally contrived. Once again, von Drehle fails to mention that the Fourth Circuit is already on board with the standard von Drehle advocates. Like other courts, the Fourth Circuit “review[s] [a] district court’s denial of a motion to amend a complaint under the deferential abuse of discretion standard.” *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 603 (4th Cir. 2010). And its past cases demonstrate that it takes such defer-

ence seriously. *See, e.g., United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 461 (4th Cir. 2013) (affirming denial of leave to amend relying inter alia on “the deference due to the district court’s decision”), *petition for cert. filed*, No. 12-1349 (May 10, 2013). That principle was and remains the law of the circuit, and the panel did not even purport to abrogate it.

Nor did the panel in this case fail to honor that principle in fact. It did *not* second-guess the district court’s findings, made (twice) before trial, that von Drehle’s delay in asserting its purported defenses was unjustified and that allowing the proposed amendment so late in the day would severely prejudice Georgia-Pacific. Pet. App. 14a-15a. To the contrary, the Fourth Circuit held that the district court erred by *ignoring* its own findings—failing to retract, modify, or distinguish them—when it decided after trial to allow the very amendments it previously had barred. *See ibid.* And the decision below did not question the district court’s determination that von Drehle “promptly alerted” the court to the *Four-U* ruling, *id.* at 25a; the Fourth Circuit simply recognized, correctly, that that promptness *did not matter* because *Four-U* is legally irrelevant. *Id.* at 15a-16a.

Desperate to squeeze some cert.-worthy legal conclusion out of the court of appeals’ entirely fact-bound ruling, von Drehle seizes on the court of appeals’ conclusion that the district court acted in an “arbitrary manner,” and therefore, in the circumstances, abused its discretion. Pet. 18 (quoting Pet. App. 11a). The Fourth Circuit did say that the district court’s action was arbitrary—because it *was*: A court (or other entity) that jettisons its own earlier ruling without confronting its own prior factual de-

terminations undeniably has acted “arbitrar[ily].” *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

What is conspicuously missing from von Drehle’s submission, however, is any authority or explanation for its central but unstated premise that the court of appeals was wrong to deem that kind of arbitrary action an abuse of discretion. It cites no case suggesting, much less holding, that a district court’s discretion under Rule 15 includes a license to ignore undisputedly relevant factors that the court itself has found. Indeed, it would be startling if any such case existed. This Court and others have made clear that a court ruling on a motion to amend abuses its discretion when it fails to consider plainly relevant factors, such as prejudice to the nonmovant. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971); *see also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam); *Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 47-48 (2d Cir. 1983). *A fortiori*, a court that flip-flops on a potentially case-dispositive issue without addressing factors that it *itself* has previously found to be proved and pertinent undoubtedly exceeds its authority.

B. The circuit split von Drehle invents concerning sua sponte invocation of preclusion (Pet. 21-25) is similarly insubstantial. von Drehle concedes that the basic standard is “common ground” (*id.* at 21)—articulated by this Court in *Arizona v. California*, 530 U.S. 392 (2000), and correctly recited by the court of appeals: Federal courts may invoke claim or issue preclusion on their own initiative, but “only in ‘special circumstances.’” Pet. App. 16a (quoting *Arizona*, 530 U.S. at 412; other citation omitted). von

Drehle claims that the decision below broke with other circuits' precedent regarding *which* circumstances are sufficiently "special." Pet. 21-25. It did no such thing.

The Fourth Circuit, in fact, announced no new principle concerning the "special circumstances" test at all. There was no need. The one example of such a circumstance that *Arizona* itself gave—"when 'a court is on notice that it has previously decided the issue presented' in another case and, by raising the issue on its own motion in a different case, thereby may avoid 'unnecessary judicial waste'"—was "plainly" inapplicable here. Pet. App. 16a-17a (quoting *Arizona*, 530 U.S. at 412). von Drehle does not claim otherwise. After all, the purportedly preclusive rulings came from other federal courts. And far from *avoiding* judicial waste, invoking preclusion sua sponte after trial would *guarantee* it: Injecting new defenses after the verdict "actually wasted judicial resources, rather than sparing them." *Id.* at 17a.

Moreover, as von Drehle further concedes (Pet. 21), the court of appeals did not question that *other* sufficiently "special circumstances" might exist; indeed, it left that possibility wide open. *See* Pet. App. 16a-17a & n.11. But there was no purpose in probing that theoretical issue any further because von Drehle never "identified *any other* 'special circumstance' justifying the district court's unusual action." *Id.* at 17a (emphasis added). Indeed, as the court pointedly noted, von Drehle did not even "discuss the holding in *Arizona* in its brief" or "otherwise respond substantively to Georgia-Pacific's argument that the present record fails to show that there were any special circumstances justifying the district court's sua sponte action." *Id.* at 17a n.12. It is perplexing, to

put it mildly, how the meaning of a decision of this Court that von Drehle previously thought too trivial and tangential to *cite* can now be so significant and central as to merit certiorari.

Despite the absence of any legal conclusion regarding the scope of *Arizona* in the decision below, and the Fourth Circuit's focus on von Drehle's failure to tender any argument, von Drehle remains confident that other circuits "clearly" would have decided this case differently. Pet. 21. Other courts, it claims, freely permit sua sponte invocation of preclusion, even merely to "prevent inconsistent outcomes and avoid relitigation" of already-decided issues. *Ibid.* Neither logic nor the lower-court opinions von Drehle cites support that sweeping claim. If the prospect of "inconsistent outcomes" or "avoid[ing] relitigation" were really enough by itself to disregard a defendant's failure to plead preclusion defenses, *Arizona*'s narrow exception would swallow the rule. Preclusion *always* aims to prevent relitigation and inconsistent results. If that is the law, *Arizona* is a dead letter.

Unsurprisingly, none of the cases von Drehle invokes supports that counterintuitive view. The few it mentions that even relate to sua sponte invocation of preclusion all were decided years before *Arizona*. See Pet. 22-23. If any of them *had* adopted von Drehle's view, they would no longer be good law. In any event, none of them embraces that extreme position. Each confirms, in fact, the general rule that preclusion ordinarily must be pleaded, and may be invoked by a court on its own authority *only* in certain limited circumstances, not as an everyday end-

run around Rule 8.<sup>8</sup> And if there is another common thread in those cases, it is that considering preclusion sua sponte is warranted *if* it will further judicial economy—a goal that it could not possibly achieve here.

von Drehle’s remaining lower-court cases do not come close to establishing a circuit split. The snip-pets it quotes extolling the importance of pursuing “harmony among the Circuits *on issues of law*” (Pet. 23 (emphasis added) (citation omitted)) have no bearing because, as discussed *infra* at 25, the decision below and the two cases with which von Drehle claims it should be “harmon[ized]” did not address any overlapping *legal* issue. von Drehle’s authorities decrying forum-shopping are even further afield. Georgia-Pacific commenced *this* case first—against von Drehle, the architect of the infringement scheme—in 2005, years before litigation delays forced Georgia-Pacific to protect its trademark rights in other fo-

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<sup>8</sup> See *Doe v. Pfrommer*, 148 F.3d 73, 80 (2d Cir. 1998) (preclusion defenses are “ordinarily not to be recognized when not in the answer,” though no “absolute bar” exists to sua sponte consideration if it advances “the strong public policy in economizing the use of judicial resources” (internal quotation marks omitted)); *Holloway Constr. Co. v. U.S. Dep’t of Labor*, 891 F.2d 1211, 1212 (6th Cir. 1989) (per curiam) (considering preclusion sua sponte is permissible to further “judicial economy”); *Carbonell v. La. Dep’t of Health & Human Res.*, 772 F.2d 185, 189 (5th Cir. 1985) (“[g]enerally” Rule 8(c)’s requirement that “defense of res judicata must be affirmatively pled” is “strictly read and applied,” and invoking preclusion sua sponte is proper only in “two limited instances”); *Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980) (per curiam) (preclusion is “affirmative defense,” but sua sponte invocation “is permissible in the interest of judicial economy where both actions were brought before the same court”).



rums. None of the cases von Drehle canvasses suggests that another circuit would reach a contrary conclusion in this unique context.

C. In its final, grasping attempt to find an issue that satisfies this Court’s Rule 10, von Drehle argues that certiorari is essential to resolve the “conflicting results” of this case, *Myers*, and *Four-U*. Pet. 26. von Drehle, tellingly, makes no pretense that the cases reached contrary conclusions on any common legal question. Nor could it, as each court decided entirely distinct issues. *Myers* addressed the merits of a trademark-infringement claim against one of von Drehle’s distributors that sold the infringing towel. See 621 F.3d at 774-77. *Four-U* did not reach the merits, but resolved only whether *Myers* had issue-preclusive effect in another suit against a different von Drehle distributor (which, unlike von Drehle, *did* promptly raise a preclusion defense). See 701 F.3d at 1097-1103. Finally, the decision below did not decide either of those issues; it held only that von Drehle, having waived its preclusion defenses by sitting on them for more than a year, was not entitled to revive them after losing at trial. Pet. App. 11a-19a.

The “conflict” (Pet. 27) von Drehle wants resolved is instead the broad-brush difference in the outcomes—by which it apparently means that Georgia-Pacific won in this case against von Drehle, but lost in suits against two downstream distributors. See *id.* at 26-28. This conflict likewise is an illusion. The cases’ outcomes are not inconsistent, but simply reflect the fundamental differences in their facts—most importantly, von Drehle’s own litigation strategy here. von Drehle undisputedly knew of its purported preclusion defenses as soon as they arose in July 2009, when the *Myers* ruling was rendered. See

Pet. App. 8a, 14a. But, unlike the defendant in *Four-U*, von Drehle—mistakenly confident that it would prevail as a matter of trademark law—chose to bypass any preclusion defense based on *Myers* and to take its chances litigating the merits. *See id.* at 6a-9a, 13a-15a. In doing so, von Drehle knowingly assumed the risk that the courts in this case, and ultimately the jury, would view the facts regarding von Drehle’s deliberate, nationwide campaign of infringement at issue here differently from the way the *Myers* court assessed the facts concerning the stuffing practices of a single local distributor serving Little Rock and Hot Springs, Arkansas.

That key fact is missing from both *Myers* and *Four-U*, and its absence fully explains the superficially divergent outcomes. The defendant in *Four-U*—then represented by one of von Drehle’s own attorneys—was able to assert preclusion because it raised that defense almost immediately, within eleven days, while von Drehle waited more than 16 months. The “conflict” between *Four-U* and this case amounts to nothing more than the fact that one defendant slept on its supposed rights while the other did not. And to the extent von Drehle complains that the findings of infringement and non-infringement here and in *Myers*, respectively, subject it and its distributors to uneven obligations, it is a complete answer that von Drehle knowingly embraced that outcome when it bet everything on winning the merits here, forgoing any argument that *Myers* foreordained a result in its favor. There is no inconsistency between *Myers* or *Four-U* and the court of appeals’ holding here that von Drehle, having chosen not to pursue preclusion, cannot now demand a do-over.

## II. THE COURT OF APPEALS' RULING IS CORRECT.

Unable to muster any actual circuit conflict on a question of federal law, von Drehle's bid for certiorari boils down to a request for a second review of the record for alleged "error." That alone should end the inquiry under this Court's Rule 10. Here, in any event, there is no error to correct.

A. The Fourth Circuit's conclusion that the district court abused its discretion by allowing an amendment *after* the verdict that it had repeatedly rejected *before* trial is amply supported by the law and the record. As the Fourth Circuit explained, von Drehle knowingly waived its purported preclusion arguments by holding them in its back pocket for more than a year after they arose. Pet. App. 13a-14a. Claim and issue preclusion are "affirmative defense[s]" that are "ordinarily lost if not timely raised." *Arizona*, 530 U.S. at 410; *see also Blonder-Tongue*, 402 U.S. at 350; Fed. R. Civ. P. 8(c)(1). That is true even if the defendant is unaware of the defense when it arises; this Court has emphatically "disapprove[d] the notion that a party may wake up because a 'light finally dawned,' years after the first opportunity to raise a [preclusion] defense." *Arizona*, 530 U.S. at 410. A defendant who *does* know of a possible preclusion defense but declines to assert it assuredly cannot resuscitate it months or years later.

Here, von Drehle undisputedly was aware of its *Myers*-based preclusion arguments as soon as that decision was issued. Its counsel attended the *Myers* trial and knew of the ruling immediately. Pet. App. 7a-8a, 14a. And one of them filed a pleading in another case asserting preclusion based on *Myers* eleven days later. *Supra* at 9 & n.4. Yet von Drehle chose *not* to assert preclusion—neither in the district

court to strengthen its pending summary-judgment motion, nor in the Fourth Circuit as an alternative basis for affirmance. Instead, it waited until months after the prior appeal and remand to seek leave to amend for the first time. Pet. App. 13a-14a.

The district court itself twice correctly determined before trial that given von Drehle’s deliberate abandonment of its defenses, allowing leave to amend at that stage would be manifestly improper and unfair. Pet. App. 8a; *see* J.A. 571. von Drehle had no “justifiable reason” for waiting so long, and letting it effectively wipe out the Fourth Circuit’s prior ruling “would prejudice [Georgia-Pacific]” and perversely “rewar[d]” von Drehle for “wast[ing] the time and money of [Georgia-Pacific] and the justice system.” *Id.* at 8a-9a (emphases omitted) (quoting BIO App. 8a); *see also* BIO App. 11a-14a (denying reconsideration).<sup>9</sup>

In light of those well-reasoned rulings and the findings supporting them, the court of appeals was certainly correct that the district court’s abrupt, unexplained about-face *after* the verdict was an abuse of discretion. The district court never amended or distinguished its earlier findings of prejudice and undue delay. Pet. App. 14a-15a. And the only explanation it did give—that von Drehle swiftly brought *Four-U* to the court’s attention—made no sense even on its face. *Four-U* decided only the preclusive effect of the *Myers* ruling on the *Four-U* case; it did not independently analyze the trademark-law merits of Georgia-Pacific’s claims. It thus “did not have any preclusive effect independent of the *Myers*

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<sup>9</sup> von Drehle, moreover, could not possibly meet Rule 16’s higher “good cause” standard. *See infra* at 32-33.

decision, and did not provide a separate basis for timely assertion of the preclusion defenses.” Pet. App. 15a-16a.

The court of appeals was therefore entirely correct to set the district court’s unreasoned ruling aside. The Federal Rules’ “liberal pleading philosophy” (Pet. 17) and district courts’ authority to permit amendments “when justice so requires,” Fed. R. Civ. P. 15(a)(2)—let alone for “good cause,” Fed. R. Civ. P. 16(b)(4)—does not include the power to discard jury verdicts on a whim based on previously available but abandoned defenses. And a district court’s discretion in applying those principles does not entitle it to ignore relevant factors when changing its mind. *See Zenith*, 401 U.S. at 330-31.

B. The Fourth Circuit’s holding that invoking preclusion *sua sponte* was inappropriate here was equally well-founded. As discussed above, *see supra* at 21-22, *Arizona* makes clear that *sua sponte* application of preclusion is the exception, reserved for “special circumstances,” not the rule. 530 U.S. at 412. And neither the district court nor von Drehle has ever identified any such circumstance. Neither one disputed the Fourth Circuit’s holding that the one example *Arizona* gave—where a court itself has already decided one of the issues presented, and invoking preclusion *sua sponte* will save judicial time and resources, *see ibid.*—could not apply here. *See* Pet. App. 16a-17a. And von Drehle has yet to offer “any *other* ‘special circumstance.’” *Id.* at 17a (emphasis added). The only candidate either suggested was the observation that Georgia-Pacific filed several lawsuits (against different defendants)—which in their view concern common issues. Pet. App. 25a; C.A. Appellee’s Br. 30. But that circumstance is not

remotely “special.” It exists in *every* case where preclusion properly applies. Having advanced no colorable argument below that *Arizona*’s stringent standard was satisfied, von Drehle cannot now complain that the court of appeals misapplied this Court’s teaching.

### **III. THIS CASE IS A POOR VEHICLE TO ADDRESS ANY OF THE ISSUES THE PETITION PRESENTS.**

Even if the circuit splits von Drehle alleges were real, or if some facet of the muddled question it presents (Pet. i) otherwise warranted certiorari, this case would be a surpassingly poor vehicle to grant review. The Fourth Circuit made clear it would have reached the same result anyway, on an independent ground that von Drehle does not suggest merits certiorari itself. And the case’s peculiar facts and posture will severely limit the scope of any guidance this Court might provide.

A. This Court “decides questions of public importance” only “in the context of meaningful litigation”; “[i]ts function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial.” *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ as improvidently granted). The Court is accordingly loath to waste its scarce time addressing issues that “could not change the result reached below.” Eugene Gressman et al., *Supreme Court Practice* 248 (9th ed. 2007). Granting review in this case would entail just such an idle, academic exercise because none of the issues von Drehle raises could actually affect the outcome.

In addition to holding that the district court erred both in allowing von Drehle to resurrect its waived preclusion defenses and in examining those

defenses sua sponte, the Fourth Circuit also concluded (as Georgia-Pacific had argued, C.A. Appellant's Br. 29-30) that "the district court acted in contravention of the mandate rule in considering von Drehle's preclusion defenses" by disregarding the court of appeals' mandate in the prior appeal. Pet. App. 17a-18a n.13. "In the context of this case," the panel explained, "the mandate rule required that the district court allow the jury to make the ultimate determination whether Georgia-Pacific could establish that von Drehle infringed Georgia-Pacific's trademarks, absent 'very special' circumstances that were not present." *Ibid.* But here "[t]he district court ... took this issue away from the jury by allowing the Arkansas court's judgment in *Myers* to decide the likelihood of confusion issue in this case." *Ibid.* The upshot is that the circuit splits von Drehle describes are not only imaginary, but irrelevant. Even if this Court reversed the Fourth Circuit's ruling regarding leave to amend or sua sponte invocation of preclusion, the mandate rule would independently require vacatur of the district court's decision.

von Drehle dismisses this obstacle in a footnote, but its makeweight rejoinders do not grapple with relevant parts of the court of appeals' decision. Pet. 19 n.7. It argues that the Fourth Circuit's prior mandate could not bar preclusion arguments based on *Myers* because the court of appeals' prior opinion did not discuss those arguments. *Ibid.* But as the decision below explained, "the mandate rule *also* 'forecloses litigation of issues decided by the district court but foregone [sic] on appeal or otherwise waived, for example because they were *not raised in the district court,*'" which was precisely the case here. Pet. App. 17a-18a n.13 (first emphasis added) (citation omitted); accord *United States v. Bell*, 988 F.2d

247, 250 (1st Cir. 1993). von Drehle does not even mention this aspect of the panel’s ruling, much less demonstrate that it is mistaken. And von Drehle’s claim that the Fourth Circuit’s prior opinion could not have foreclosed preclusion arguments based on *Four-U* ignores the court of appeals’ conclusion that *Four-U* did not have any preclusive effect of its own, and thus could not give rise to any freestanding preclusion argument not barred by the Fourth Circuit’s prior mandate. Pet. App. 15a-16a.<sup>10</sup>

B. While the court of appeals’ independent mandate-rule conclusion all but ensures that any decision by this Court will not affect the outcome *here*, the idiosyncratic facts of this case make it very unlikely that a decision from this Court will provide guidance in many *others*.

To begin with, although von Drehle frames the fictional leave-to-amend circuit split as a dispute over Rule 15, the relevant standard here is Rule 16. As Georgia-Pacific explained below, C.A. Appellant’s Br. 32, because von Drehle sought leave to amend long after the time prescribed in the scheduling order, *see* J.A. 108, 110-14, it bore the even heavier burden of showing “good cause” for its proposed out-of-time amendments, Fed. R. Civ. P. 16(b)(4); *see Nourison Rug Corp. v. Parvizian*, 535 F.3d 295, 298 (4th Cir. 2008), which required von Drehle to demonstrate affirmatively that it acted with “diligence.” *Somascan, Inc. v. Philips Med. Sys. Nederland, B.V.*, 714 F.3d 62, 64 (1st Cir. 2013) (*per curiam*) (citation omitted); *accord, e.g., In re W. States Wholesale Nat-*

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<sup>10</sup> von Drehle did not argue below, *see* C.A. Reply 11 n.3, and does not argue here, that any of the narrow exceptions to the mandate rule applies.



*ural Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir. 2013); *Holmes v. Grubman*, 568 F.3d 329, 334-35 (2d Cir. 2009). von Drehle did not and cannot make that showing, and in any event deciding whether it satisfied Rule 16 likely would provide no opportunity to resolve a supposed split regarding Rule 15.

Regardless which Rule this Court deems applicable, moreover, the unique facts of this case would limit sharply the value of any guidance this Court could provide. The extreme circumstances of von Drehle's waiver of its purported defenses—*i.e.*, that von Drehle's counsel attended the *Myers* trial, that they raised preclusion arguments in other cases days later, and that von Drehle made no such arguments for more than a year in either the district court or the court of appeals—are quite unlikely to recur. Likewise, the odds that other courts will emulate the district court's unexplained change of position—repeatedly rejecting requests for leave to amend based on well-grounded factual findings, only to discard them without comment after a jury verdict—are very slim indeed. The chances that any decision in this case will shed light on many others are thus exceptionally low. If any of the issues von Drehle raises truly requires this Court's guidance, the Court at least should await a case that remotely resembles a typical suit where those issues arise and actually matter.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Counsel for Respondent*

August 23, 2013

# **APPENDIX**

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**APPENDIX A**

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FILED: May 13, 2013

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 12-1444  
(5:05-cv-00478-BO)

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GEORGIA PACIFIC CONSUMER PRODUCTS, LP

Plaintiff – Appellant

and

GEORGIA-PACIFIC CORPORATION

Plaintiff

v.

VON DREHLE CORPORATION, a North Carolina  
corporation

Defendant – Appellee

and

2a

CAROLINA JANITORIAL & MAINTENANCE  
SUPPLY, a North Carolina corporation

Defendant

MYERS SUPPLY, INCORPORATED

Intervenor/Defendant

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ORDER

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Upon consideration of submissions relative to the motion to stay mandate, the court denies the motion.

Entered at the direction of the panel: Judge Gregory, Judge Keenan and Senior Judge Payne.

For the Court

/s/ Patricia S. Connor, Clerk

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**APPENDIX B**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
NORTH CAROLINA  
WESTERN DIVISION

No. 5:05-CV-478-BO

GEORGIA-PACIFIC )  
CONSUMER PRODUCTS )  
LP, )

Plaintiff, )

v. )

VON DREHLE )  
CORPORATION, )

Defendant. )

**ORDER**

This matter is before the Court on Defendant's Motion to Amend/Correct and to Supplement Answer and Affirmative Defenses (D.E. # 222), Defendant's Motion to Dismiss Based on Issue Preclusion and Claim Preclusion (D.E. # 224), and Plaintiffs Motion for Leave to Supplement Expert Report (D.E. # 220).

Defendant's Motions are DENIED, and Plaintiff's Motion is GRANTED.

## I. FACTS

Plaintiff (“GP”) leases its hands-free enMotion® paper towel dispensers to distributors. The distributors in turn sublease the dispensers to end users – baseball stadiums, restaurants, and other businesses – that install them in their restroom facilities.

Through its lease and sub-lease agreements, GP conditions the leasing of its dispensers upon the exclusive use of GP’s brand paper towels inside the dispensers. GP alleges that Defendant von Drehle wrongly sold von Drehle’s replacement paper towels to distributors for use in GP’s dispensers, thereby interfering with GP’s leases and subleases and creating customer confusion regarding GP’s trademark.

### A. The Claims

GP sued von Drehle on July 7, 2005 for, *inter alia*, (1) contributory infringement and unfair competition in violation of the Lanham Act, (2) unfair competition in violation of North Carolina common law, and (3) tortious interference with contractual relationships in violation of North Carolina common law. (DE # 1)

On March 24, 2006, von Drehle filed its initial answer and counterclaims. (DE # 37). von Drehle then amended its pleading three times—on March 29, 2006, April 10, 2006, and January 19, 2007. (DE # 39, 40, 89). In its most recent counterclaims, von Drehle alleged that GP had (1) engaged in a “tying” arrangement, in violation of the federal antitrust laws, (2) committed a second federal antitrust violation by entering into an anti-competitive settlement agreement with a third party, (3) violated North Carolina antitrust statutes, and (4) violated North Carolina’s Unfair and Deceptive Trade Practices Act.

### B. The “Arkansas Case”

On September 22, 2008, more than three years after filing this suit, GP sued von Drehle’s distributor, Myers Supply, Inc., in the U.S. District Court for the Western District of Arkansas. GP alleged that Myers Supply had bought replacement towels from von Drehle, and then resold the towels to end users who placed those towels in GP’s dispensers. GP’s claims against Myers Supply were almost identical to its claims against von Drehle in this case, and included trademark infringement, tortious interference under Arkansas law, and violation of the Arkansas Deceptive Trade Practices Act.

On June 26, 2009, the Arkansas District Court granted summary judgment for GP’s claims against Myers Supply for direct trademark infringement and the contract-related claims, leaving for trial the question of contributory infringement. One month later, after a two-day bench trial, the Arkansas District Court dismissed with prejudice Georgia-Pacific’s remaining claim for contributory trademark infringement on July 23, 2009.

Until now, von Drehle has not sought to amend its pleadings in the instant case to reflect the Arkansas decision. Nor has von Drehle ever sought a stay pending the outcome of the Arkansas case.

### C. Procedural History in this Court

This Court granted von Drehle summary judgment on all of GP’s claims on August 14, 2009. (DE # 195). This Court also granted GP summary judgment on all of von Drehle’s counterclaims. *Id.*

GP appealed the summary judgment on its four claims to the Fourth Circuit, while von Drehle only



appealed the summary judgment for GP on its Unfair and Deceptive Trade Practices claim.

The Fourth Circuit found that GP's consumer surveys presented a genuine issue of material fact as to the likelihood of customer confusion and damage to Plaintiff's reputation regarding the "stuffing" of its dispensers with von Drehle's towels. Accordingly, the Fourth Circuit vacated the grant of summary judgment for all of GP's claims and remanded to this Court for further proceedings on August 10, 2010. (DE # 204). The Fourth Circuit affirmed the grant of summary judgment for GP regarding von Drehle's counterclaim.

Meanwhile, the Eighth Circuit Court of Appeals affirmed the Arkansas District Court's judgments on September 5, 2010. *Georgia-Pacific v. Myers Supply*, 621 F.3d 771 (8th Cir. 2010).

The Fourth Circuit denied von Drehle's petition for rehearing on September 8, 2010, and its remand became effective on September 16, 2010. (DE # 208). Once back in this Court, GP motioned for leave to supplement its expert report on Nov 17, 2010. (D.E. # 220). von Drehle motioned to amend its pleadings on Nov 19, 2010 (D.E. # 222), and motioned to dismiss for issue and claim preclusion three days later. The Court held a hearing on these instant motions on January 28, 2011.

## II. DISCUSSION

The Court denies von Drehle's Motion to Amend its Answer and its Motion to Dismiss. Additionally, the Court grants GP's Motion for Leave to Supplement its Expert Report.

A. von Drehle's Motion to Amend (DE # 222)

von Drehle seeks to assert the additional defenses of claim and issue preclusion, and to clarify its defenses of unclean hands and abandonment. von Drehle bases all sought amendments<sup>1</sup> on the July 23, 2009 Arkansas decision issued 16 months before the filing of this motion.

A court may deny a motion for leave to amend a pleading for “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, futility of amendment, etc....” *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980).

Here, von Drehle has unduly delayed in amending its Answer. Although von Drehle was not a party to the Arkansas case, two of von Drehle's attorneys, Albert P. Allan and Michael P. Thomas, attended the trial and knew about the court's decision. Pl.'s Response to Def.'s Mot. to Amend at 18; Def.'s Reply (not denying immediate knowledge of decision). Up until now, von Drehle has never requested that this Court, or the Fourth Circuit, stay or dismiss this case for issue or claim preclusion. To the contrary, von Drehle continued to pursue its counterclaim up to the Fourth Circuit for a year after the Arkansas decision. Similarly, von Drehle has had 16 months to “clarify” its other defenses “in the wake of the [the Arkansas decision].” Def.'s Memo in Support of Mot

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<sup>1</sup> Def.'s Memo in Support of Mot to Amend at 5 (stating the proposed amendments to the existing clean hands and abandonment defenses “merely clarifie[] the legal position of von Drehle, in the wake of the Myers Case.”)

to Amend at 5. von Drehle has provided no justifiable reason for its delay, and its argument that “no significant time has passed” is unpersuasive. Def.’s Reply at 2.

Alternatively, these amendments would prejudice GP. In the 16 months between the Arkansas decision and von Drehle’s motion, GP has expended considerable time, energy, and resources litigating this case. This matter is finally ready for trial. All this effort, not to mention the efforts of this Court and that of the Fourth Circuit, could have been avoided if von Drehle had amended its defenses to include claim and issue preclusion back in 2009. von Drehle cannot now be rewarded after it wasted the time and money of GP and the justice system. For the same reasons, von Drehle cannot now “clarify” its defenses based on the Arkansas decision.

Accordingly, von Drehle’s Leave to Amend is denied.

B. von Drehle’s Motion to Dismiss Based on Issue and Claim Preclusion (DE # 224).

As von Drehle cannot amend its Answer to include the defenses of issue and claim preclusion, von Drehle’s Motion to Dismiss on these grounds is denied as moot.

C. GP’s Motion for Leave to Supplement Expert Report (DE # 220)

The Court grants GP’ Motion to Supplement Dr. Eli Seggev’s expert report as it is substantially justified and would cause no prejudice to von Drehle.

In *Southern States Rack and Fixture, Inc. v. Sherman-Williams Co.*, the Fourth Circuit Court of Appeals adopted a five-factor test to determine

whether to exclude evidence when a party has failed to timely disclose:<sup>2</sup> (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence, and (5) the nondisclosing party's explanation for its failure to disclose. 318 F.3d 592, 597 (4th Cir. 2003).

GP originally disclosed its expert witness, Dr. Eli Seggev, in 2005. Dr. Seggev submitted expert reports in May 2005, August 2006 and November 2006, which concluded that the practice of “stuffing” enMotion® towel dispensers with von Drehle towels creates a likelihood of post-sale confusion. GP now requests the Court to allow Dr. Seggev to rely on a new study performed by Dr. Gerald L. Ford (the “Ford Report”) that comes to the same conclusion. GP disclosed to von Drehle that Dr. Seggev intended to rely on the Ford study in this case on approximately October 20, 2010. Pl.’s Memo in Support of Motion to Supp. at 2; Def.’s Response at 6.

Previously, Dr. Ford has reported his findings in a January 27, 2010, Rule 26(a)(2) expert disclosure in *Georgia-Pacific Consumer Products et al. v. Superior Janitor Supply, Inc.*, Case No. 1:09-cv-323 (S.D. Ohio). That case also involves the stuffing of enMotion® dispensers with von Drehle towels. Importantly, Attorney Albert Allan represents both von Drehle and Superior Janitor Supply. Additionally, Superior Janitor Supply has acknowledged that von Drehle is paying the costs of having Mr. Allan defend Superior

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<sup>2</sup> The Court assumes without finding that the GP’s disclosure of the new evidence was untimely under Federal Rules of Civil Procedure 26(a)(2)(8), 26(a)(2)(E) and 26(e).

in that action. Pl.'s Memo in Support of Motion to Supp. at 1-2; Def.'s Response (not denying).

According to the Fourth Circuit's five factor test, the evidence should be admitted. First, there is no surprise to von Drehle because it is aware of the Ford Report from the Ohio case. The evidence would not disrupt the trial because no trial date has been set, and the Ford Report merely provides added support for opinions already disclosed. Additionally, the evidence goes to the key issue in the case – the likelihood of post sale confusion. Finally, GP is not responsible for the five-and-a-half year delay since Dr. Seggev's provided his original opinion, and it is reasonable for Dr. Seggev to update the basis for his expert conclusions. GP also appropriately moved to supplement Dr. Seggev's report shortly after the Fourth Circuit's remand.

Therefore, the Court grants GP' Motion to Supplement the Expert Report. (D.E. # 220).

### III. CONCLUSION

The Court DENIES Defendant's Motion to Amend its Answer (DE # 222) and its Motion to Dismiss. (DE # 224). The Court GRANTS Plaintiff's Motion for Leave to Supplement its Expert Report. (DE # 220).

SO ORDERED, this 18 day of March, 2011.

s/  
TERRENCE W. BOYLE  
UNITED STATES  
DISTRICT JUDGE

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**APPENDIX C**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
NORTH CAROLINA  
WESTERN DIVISION  
No. 5:05-CV-478-BO

GEORGIA-PACIFIC	)	
CONSUMER PRODUCTS,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	<u>ORDER</u>
	)	
VON DREHLE	)	
CORPORATION,	)	
	)	
Defendant.	)	
_____	)	

This matter is before the Court on Defendant von Drehle's Motion for Reconsideration [DE 241] and a Motion to Intervene as a Defendant filed by Myers Supply, Inc. [DE 246]. Plaintiff Georgia-Pacific has responded to the instant motions, von Drehle and Myers Supply have replied, and the matters are ripe for ruling. For the reasons discussed below, Defendant von Drehle's Motion for Reconsideration is denied, Myers Supply's Motion to Intervene is denied, and this matter will proceed to trial on the Court's November calendar.

### BACKGROUND

This matter has been before this Court in some manner for more than six years, and this Court has entered numerous orders recounting the specific facts and procedural posture of the case. Therefore, the Court hereby incorporates by reference the background and facts of this case enumerated in this Court's order entered March 21, 2011 [DE 238].

### DISCUSSION

#### Motion to Reconsider

Defendant von Drehle (VD) asks that this Court reconsider its order of March 21, 2011, denying its request to amend its answer to assert preclusion defenses and to dismiss the complaint based on issue and claim preclusion. VD seeks relief from the March 21, 2011, order under Rule 60(b) of the Federal Rules of Civil Procedure. F.R.C.P. 60(b) provides an avenue to seek relief from a final judgment, order, or proceeding. Relief under Rule 60(b) is only appropriate as to *final* orders, judgments, or proceedings; Rule 60(b) is not the appropriate basis on which to review an interlocutory order. *See Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469 (4th Cir. 1991). Accordingly, this Court will construe VD's motion as one for reconsideration of an interlocutory order.

Motions for Reconsideration are allowed in "certain, limited circumstances," and it is within the discretion of the trial court to determine whether reconsideration of an interlocutory order is appropriate. *Wiseman v. First Citizens Bank & Trust Co.*, 215 F.R.D. 507 (W.D.N.C. 2003); *Webster Motor Car Co. v. Zell Motor Car Co.*, 234 F.2d 616 (4th Cir. 1956). Their purpose is to allow the Court "correct manifest

errors of law or fact or to [consider] newly discovered evidence,” and are improper if they serve merely to ask the Court “to rethink what the Court had already thought through—rightly or wrongly.” *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3rd Cir. 1985); *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va. 1983).

Here, VD has asserted that this Court’s March 21, 2011, order was based on a mistaken understanding of legal standards [DE 242]. In its motion, however, it has failed to show that the basis of this Court’s order is grounded in a mistake of law or fact. The standard for allowing or denying amendments to pleadings under F.R.C.P. 15 is clear: “[m]otions to amend are committed to the discretion of the trial court.” *Keller v. Prince George’s County*, 923 F.2d 30, 33 (4th Cir. 1991)(citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Additionally, a Court may deny a motion to amend for “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, futility of amendment, etc....” *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980).

This Court acted appropriately and within its discretion to find that VD had unduly delayed and alternatively would prejudice Plaintiff if allowed to amend its answer at such a late stage in the proceedings. VD did in fact delay for sixteen (16) months from the date of the Arkansas decision before seeking to amend its pleadings, only moving to amend its answer (for a fourth time) after it had submitted an amended proposed pretrial order to the Court [DE 219]. Prejudice to Plaintiff would result if VD was



allowed to amend its answer after six years of litigation, including an appeal to the Fourth Circuit Court of Appeals, and where the parties had indicated they were ready for trial. Accordingly, VD's Motion for Reconsideration is DENIED.

#### Motion to Intervene

Also before the Court is a Motion to Intervene as a Defendant by Myers Supply, Inc. F.R.C.P. 24 provides the basis on which a party may seek to intervene in a lawsuit once it has been filed. Myers Supply, Inc. (Myers) seeks to intervene under Rule 24(a), which provides that intervention as of right shall be permitted under certain circumstances. F.R.C.P. 24(a). The party seeking to intervene must "show that (1) it has an interest in the subject matter of the action, (2) disposition of the action may practically impair or impede the movant's ability to protect that interest, and (3) that interest is not adequately represented by existing parties." *Newport News Shipbuilding and Drydock Co. v. Penninsula Shipbuilders' Ass'n*, 646 F.2d 117 (4th Cir. 1981) (citing *Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214,216 (4th Cir. 1976)).

Any application to intervene must also be timely, and the Court has wide discretion in deciding whether the timeliness requirement has been satisfied. *Brink v. DaLesio*, 667 F.2d 420, 428 (4th Cir. 1981); see also *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989). In determining the timeliness of an application for intervention, the Court should consider "how far the suit has progressed, the prejudice which delay might cause other parties, and the reason for the tardiness for moving to intervene." *Gould*, 883 F.2d at 286 (citing *Commonwealth of Pa. v. Rizzo*, 530 F.2d 501, 506 (3rd Cir. 1976)).

Myers was aware of this action at least as early as 2008, when it filed its answer in a separate matter filed by Plaintiff Georgia-Pacific in the U.S. District Court for the District of Arkansas [DE 250-1]. Considering Myers' knowledge of this case for at least two years prior to its Motion to Intervene, in addition to the fact that this case has progressed over six years of extensive litigation to finally stand ready for trial, Myers' Motion to Intervene is undoubtedly tardy. *See Gould*, 883 F.2d at 286 (holding that two years of litigation and the finality of settlement negotiations was delay enough to find a motion to intervene tardy).

Although such gross delay is a sufficient basis for this Court to deny Myers' motion, the Court will go on to consider whether Myers fails to satisfy the remaining requirements of Rule 24(a) intervention. In addition to having a timely application, each of the requirements listed above must be satisfied for the Court to allow intervention. *Newport News Shipping and Drydock Co.*, 646 F.2d at 117. The crux of Myers' argument lies in the third requirement – that its interest is not, or no longer, adequately protected by Defendant VD.

In assessing whether VD continues to adequately represent the interests of Myers, the Court must consider whether Myers has the same ultimate goals in this case as VD. *Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214, 216 (4th Cir. 1976). If the goals of VD and Myers are found to be the same, Myers must then “demonstrate adversity of interest, collusion, or nonfeasance” to overcome a finding that its interests are adequately represented by a party already in the suit. *Id.*

Myers seeks to defend against the claims of Plaintiff Georgia-Pacific by asserting the affirmative defenses of issue and claim preclusion based on the ruling of the Arkansas District Court [DE 246-1]. This is the identical posture sought by Defendant VD in its Motion to Amend and Motion for Reconsideration addressed above. Myers has offered nothing else to show that it has an interest that is otherwise unrepresented by Defendant VD; it appears to seek to intervene merely to be allowed an opportunity to relitigate issues already decided by this Court.

Myers has not shown that its interests are adverse to VD, nor has is shown collusion between VD and Plaintiff Georgia-Pacific or nonfeasance on the part of any party. Further, counsel for Myers is identical to counsel for VD<sup>1</sup>, indicating, if nothing else, that Myers would concede that the representation of VD's interests, which are identical to its own, has been adequate. *See Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 42 F.R.D. 406, 408 (S.D.N.Y. 1967) (holding that where counsel for intervenor and defendant are the same, and such counsel would make the same assertions on behalf of intervenor as it had for defendant, intervenor has conceded that the party defendant is well represented).

Myers has failed to timely make an application to intervene in addition to having failed to show that its interests are inadequately protected by VD. Accordingly, Myers' Motion to Intervene is denied.

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<sup>1</sup> Counsel for both parties is listed in Court filings as follows: Michael P. Thomas of Hickory, N.C.; Albert P. Allan of Charlotte, N.C.; and Stephen L. Curry of Little Rock, Arkansas.

CONCLUSION

For the reasons discussed above, Defendant VD's Motion for Reconsideration is DENIED, the Motion to Intervene by Myers Supply, Inc. is DENIED, and this matter is hereby SET FOR TRIAL for the term of this Court beginning Monday, November 21, 2011.

SO ORDERED, this 20 day of September, 2011.

s/  
TERRENCE W. BOYLE  
UNITED STATES  
DISTRICT JUDGE

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**APPENDIX D**

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Federal Rule of Civil Procedure 8(c)(1) provides:

**Rule 8. General Rules of Pleading**

. . .

**(c) AFFIRMATIVE DEFENSES.**

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;

- statute of frauds;
- statute of limitations; and
- waiver.

...

Federal Rule of Civil Procedure 15, subsections (a)(1), (a)(2), and (d), provides:

**Rule 15. Amended and Supplemental Pleadings**

(a) AMENDMENTS BEFORE TRIAL.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, 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.

...

(d) SUPPLEMENTAL PLEADINGS. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit sup-

plementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Federal Rule of Civil Procedure 16, subsections (b)(3) and (b)(4), provides:

**Rule 16. Pretrial Conferences; Scheduling; Management**

...

(b) SCHEDULING.

...

(3) *Contents of the Order.*

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

- (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);
- (ii) modify the extent of discovery;
- (iii) provide for disclosure or discovery of electronically stored information;
- (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after information is produced;

21a

(v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

(4) *Modifying a Schedule.* A schedule may be modified only for good cause and with the judge's consent.

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**APPENDIX E**

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**Photograph of Plaintiff's Trial Exhibit #212:  
Georgia-Pacific enMotion® Dispenser  
(C.A. Joint Appendix 1175)**

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**APPENDIX F**

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**Photograph of Plaintiff's Trial Exhibit #280:  
von Drehle "28810" Dispenser  
(C.A. Joint Appendix 1181)**