

I. INTRODUCTION

Plaintiffs' lawsuit is a moving target. The Original Complaint mentioned state claims only in Utah. The next complaint asserted violations in 12 states. Plaintiffs next attempted a complaint implicating the laws of 7 seven states. The proposed Third Amended Complaint now speaks of violations in 11 states. New Named Plaintiffs seem to appear with every filing.

At this point, Defendants are prejudiced by these serial amendments. Plaintiffs simply must decide what state laws they are suing under and who the representative plaintiffs will be. They can no longer rely on Defendants' Motions to Dismiss and Motion for More Definite Statement to educate them about the viability of their claims. They also cannot stall this Court's ruling on the pending Motion to Dismiss the Utah Claims and for a Cease and Desist Order while they continue to solicit opt ins via their website in order to add more Rule 23 state claims indefinitely. It is time for Plaintiff to "get it right" with respect to the filing of the Complaint. The proposed Third Amended Complaint should be disallowed in its entirety, without further opportunity to amend.

II. PLAINTIFFS' SERIAL AMENDMENTS FAIL TO CURE THE DEFECTS RECITED IN DEFENDANTS' MOTION TO DISMISS.

Plaintiffs filed their Original Complaint on May 16, 2008, and asserted FLSA and Utah state wage claims. Defendants moved to dismiss the state law claim on various grounds.

Plaintiffs filed a First Amended Complaint on June 23, 2008, wherein they raised unspecified state wage-and-hour and common law claims in 12 states, and a recordkeeping violation claim under the Fair Labor Standards Act. The defective Utah claims remained. Defendants were forced to withdraw and re-file their Motion to Dismiss, this time arguing that the five Named Plaintiffs lacked standing to assert claims in all 12 states and that no private right

of action existed for either their Utah Payment of Wages Act (“UPWA”) claim or their FLSA recordkeeping violation claim. In addition, Defendants were required to move for a More Definite Statement, because Plaintiffs’ failed to recite the state “Wage and Hour Laws” at issue or to provide any factual basis for their newly raised contract claims. Clearly a law firm in search of a lawsuit, Plaintiffs’ counsel continued to solicit opt ins while they left Defendants pondering which laws they were being sued under.

Plaintiffs next requested leave to amend and filed a proposed Second Amended Complaint on August 28, 2008. They added Named Plaintiffs from various states, attempting to cure the initial lack of standing, and removed the improper recordkeeping claim entirely. They also deleted statutory claims for Georgia, Idaho, Missouri, New Mexico and Pennsylvania, and added statutory references for the remaining wage claims. The defective UPWA claim again remained. Importantly, none of these changes was due to new information, or new evidence. The changes were a direct result of the footwork and analysis supplied by Defendants. Thus, rather than research their own claims prior to initiating this lawsuit, Plaintiffs relied on Defendants’ time and money to review their pleadings, research their claims, and point out myriad problems associated with their filings.

On their fourth try, Plaintiffs still fail to get it right, again asserting the defective UPWA claim. Plaintiffs apparently expect Defendants to withdraw their (second) Motion to Dismiss -- again -- review Plaintiffs’ Complaint -- again -- research Plaintiffs’ claims -- again -- and let Plaintiffs know exactly what is wrong this time. Defendants should not be forced to refine Plaintiffs’ case for them, more than four months after they filed their initial Complaint.

III. PLAINTIFFS' PROPOSED AMENDED COMPLAINT SHOULD BE DISALLOWED AS PREJUDICIAL, DILATORY, AND IN PART, FUTILE.

Rule 15a provides that leave to amend be freely given “when justice so requires.”

Friedman v. Transamerica Corp., 5 F.R.D. 115, 115-16 (D. Del. 1946). But leave to amend is not granted without limit. “[O]therwise, the right to amend would be absolute and not rest in the discretion of the court. The interests of both parties should be considered when an application to amend is made.” *Id.*

In *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1205-06 (10th Cir. 2006), the court noted that denial of a motion to amend is proper when it appears that a plaintiff is using Rule 15a to make the complaint a “moving target.” *Accord*, *Viernow v. Euripides Dev. Corp.*, 157 F.3d 785, 800 (10th Cir. 1998). *See also* *Hayes v. Whitman*, 264 F.3d 1017, 1027 (10th Cir. 2001) (“party [may not amend to] ‘salvage a lost case by untimely suggestion of new theories of recovery’”); *Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1027 (10th Cir. 1994) (amendment improper to offer “theories *seriatum*” in an effort to avoid dismissal); *Walters v. Monarch Life Ins. Co.*, 57 F.3d 899, 903 (10th Cir. 1995) (amendment improper if used to delay proceedings).

This Circuit has further held that, “[a] court properly may deny a motion for leave to amend as futile when the proposed amended complaint would be subject to dismissal for any reason” *E. SPIRE Commc’ns, Inc. v. New Mexico Pub. Regulation Comm’n*, 392 F.3d 1204, 1211 (10th Cir. 2004) (citations omitted). Courts should also “consider the likelihood that the new claim is being added in a desperate effort to protract the litigation and complicate the defense.” *See Glatt v. Chicago Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996) (holding that a district court, in considering a motion to amend, should consider such factors).

At bottom, where an amendment is futile, dilatory and prejudicial, amendment is properly denied. *See Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365-66 (10th Cir. 1993) (refusing leave to amend justified upon showing of “undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment”). *See also Sprint Commc’ns Co. v. Vonage Holdings Corp.*, 500 F. Supp. 2d 1290, 1348 (D. Kan. 2007) (“The most important factor in deciding a motion to amend pleadings is whether the amendment would prejudice the nonmoving party.”) Importantly, “***where the party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion to amend is subject to denial.***” *Frank*, 3 F.3d at 1365-66 (emphasis added).

Here, Plaintiffs’ serial amendments are not without cost to the other side. Twice Defendants have briefed Motions to Dismiss. They also moved for a more Definite Statement because Plaintiffs failed to specify in the First Amended Complaint the state laws supposedly violated, or the basis for their common law breach of contract claims. Once educated, Plaintiffs attempted to cure, in part, the defects in their case.

Meanwhile, Defendants attempted to investigate claims and outline their defense based on the claims of the Named Plaintiffs. Initial Disclosures -- due this date, September 17, 2008 -- were readied, and a discovery plan outlined based on the First Amended Complaint, the only operative Complaint in this action. This work is undermined to the extent yet more Named Plaintiffs and state law claims are added and deleted at every turn.

Plaintiffs come before this court with a proposed *Third* Amended Complaint seeking to change the litigation landscape once again.¹ But the proposed amendment remains defective insofar as it continues to assert improper claims under Utah law. Given the very recent attempt to file a Second Amended Complaint, Plaintiffs' failure to timely oppose Defendants' Motion to Dismiss,² and the current website concerns, Plaintiffs' conduct in filing a proposed Third Amended Complaint can only be viewed as futile, dilatory and prejudicial. Plaintiffs simply must be ordered to stop moving the target. *Wopsock v. Natchees*, 279 Fed. Appx. 679 (10th Cir. May 23, 2008) (citing *Minter v. Prime Equip. Co.*, saying: "courts will properly deny a motion to amend when it appears that the plaintiff is using Rule 15 to make the complaint a moving target, to salvage a lost case by untimely suggestion of new theories of recovery, to present theories seriatim in an effort to avoid dismissal, or to knowingly delay . . .").

¹ No Second Amended Complaint was actually accepted by this Court, though Defendants consented to the entry of that proposed pleading.

² Plaintiffs' recent statements to the Court about "misstating" the due date in their "Final" request for an extension of time to oppose the motion do not ring true. Plaintiffs' counsel, in a telephone conversation of September 16, 2008, inquired as to whether or not the pending Motion to Dismiss the First Amended Complaint would be withdrawn based on the filing of the proposed Third Amended Complaint the night before. Because the proposed complaint did not cure the defective Utah claims, defense counsel indicated that the motion would not be withdrawn. Plaintiffs' counsel then asked for yet another extension to file the papers, never mentioning a "misstatement" in the earlier, "Final Motion" to extend Plaintiffs' response date. Significantly, Plaintiffs' counsel previously represented to this Court that they were "diligently working on preparing the responses" -- in August -- and would likely file their Opposition papers ahead of the requested September 16, 2008 deadline. *See* "First Motion For Extension of Time to Respond to Defendants' Motion to Dismiss," dated August 27, 2008.

IV. THE PROPOSED THIRD AMENDED COMPLAINT SHOULD NOT BE PERMITTED.

Based on the foregoing, Defendants respectfully request that the Plaintiffs' Third Amended Complaint be disallowed entirely. To the extent the Court is inclined to permit the Amendment, it should (1) exclude the defective Utah state claims, pending the Court's ruling on the outstanding Motion to Dismiss and (2) do so only on condition that Plaintiffs be foreclosed from filing additional amendments to their Complaint hereafter. While the closure of the Complaint is generally reserved until after the Rule 16 Conference, under the unique circumstances here, where Plaintiffs have repeatedly availed themselves of the amendment device to file not one, not two, not three but four complaints in the space of as many months, such an order is proper and necessary. Otherwise, Defendants will be continually left to wonder what lawsuit they are litigating this week. If the Amendment is permitted, within the allowable briefing period, Defendants request that they have the right to Move to Dismiss any new claims to the extent that they are defective.

DATED this 17th day of September, 2008.

Respectfully submitted,

_____/s/Mary C. Dollarhide_____

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2008, a true and correct copy of the foregoing was served by the method indicated below, to the following:

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