IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-B-1854

LAWRENCE GOLAN, et. al.,

Plaintiffs,

v.

JOHN ASHCROFT, in his official capacity as Attorney General of the United States,

Defendant.

OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

Preliminary Statement

Plaintiffs have moved for leave to amend their complaint in two respects. First, Plaintiffs seek to add as a defendant Marybeth Peters, the Register of Copyrights. Second, Plaintiffs seek to add language noting their belief that this lawsuit brings "as applied," as well as facial challenges, although Plaintiffs are careful to note that this change creates "no new legal theories." Pl. Mot. at 2. Plaintiffs provide the Court no explanation as to why these changes were not in their original complaint, filed almost three years ago. Nor do they provide an explanation why these changes were not made in their first amended complaint, filed a year and a half ago. Plaintiffs cannot claim ignorance. Several of their lawyers in this lawsuit are also counsel for the plaintiffs in Luck's Music Library, Inc. v. Ashcroft, Civ. No. 01-2220 (D.D.C.), a

parallel challenge to §514 of the Uruguay Round Agreements Act, where the Register of Copyrights was named as a defendant in October of 2001. Plaintiffs (or their lawyers) clearly were aware of the issue.

Under Federal Rule of Civil Procedure 15(a), as interpreted by the Tenth Circuit, if a plaintiff is aware of a reason for amending his complaint, yet takes no action until a significant period of time elapses, the Court may deny permission to amend. That is the case here. Plaintiffs have sat silent as this litigation proceeded for almost three years without taking action and have failed to provide any explanation for this delay. In the absence of a convincing rationale, this Court should deny Plaintiffs' motion to amend.

Background

Plaintiffs filed this lawsuit on September 19, 2001. They named as a defendant only the Attorney General, John Ashcroft. On February 18, 2003, Plaintiffs moved to amend their complaint. See Docket #15. This amendment—filed seventeen months after the original complaint in this lawsuit—also did not name the Register of Copyrights as a defendant.

Now Plaintiffs, a month and a half shy of three years into this litigation, have moved to add the Register of Copyrights as a defendant and to make other cosmetic changes to their complaint. Plaintiffs have not explained why they failed to make these changes until this late date.

Argument

Federal Rule of Civil Procedure 15(a) gives a plaintiff a limited time during which he may amend his complaint as of right. After that period expires, however, the plaintiff must either secure the defendant's consent for amendment or persuade the Court that good reason exists for the amendment. See Foman v. Davis, 371 U.S. 178, 182 (1962). Where a plaintiff possessed the knowledge necessary to amend the complaint for some time, yet did not move to amend, an explanation is in order: "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." Las Vegas Ice & Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting State Distributors, Inc. v. Glenmore Distilleries Co., 738 F.2d 405 (10th Cir. 1984); Panis v. Mission Hills Bank, N.A., 60 F.3d 1486, 1495 (10th Cir. 1995) (same); Wessel v. City of Albuquerque, 299 F.3d 1186, 1197 (10th Cir. 2002) (affirming the denial of the motion to amend because "Plaintiffs did not promptly move to amend their Complaint once they received [the additional] information nor did they move for an extension") (bracket in original); Martinez v. United States, 311 F. Supp. 2d 1274, 1279–80 (D.N.M. 2004) (similar).

Plaintiffs' motion for leave to amend provides no explanation for Plaintiffs' inaction. Plaintiffs could have named the Register of Copyrights as a defendant when they first brought this suit in September of 2001. Likewise, they could have named her as a defendant when they amended their complaint in February of 2003. Lawrence Lessig, Edward Lee, and Jonathan

Zittrain, attorneys for Plaintiffs in this lawsuit, are also attorneys for the plaintiffs in Luck's Music Library, and in that lawsuit the Register of Copyrights was a named defendant. See Luck's Music Library, Inc. v. Ashcroft, Civ. No. 01-2220 (D.D.C.) (Pl. Compl., filed Oct. 29, 2001) [Attached as Ex. 1]. Accordingly, Plaintiffs cannot claim that they were unaware of the question whether they should name the Register as a defendant. Similarly, Plaintiffs cannot claim that they were unaware of the distinction between facial and as applied challenges when they filed the original (and first amended) complaint. Without a reasonable explanation for their failure to fix the problems sooner, the Court should deny Plaintiffs' motion to amend the complaint.

Instead of explaining their delay, Plaintiffs' motion focuses on whether their amendment would prejudice the government. This focus arises from Plaintiffs' belief that the only reason for opposing an amendment is "when prejudice to the opposing party would result," and that "[t]he burden of showing prejudice is on the party opposing the amendment." Pl. Mot. at 4–5. But the Tenth Circuit has explicitly repudiated the position that a showing of prejudice is necessary to denying a motion to amend:

> [The Eighth Circuit has] stated that mere delay is not a reason in and if itself to deny leave to amend. There must be some prejudice which would result to others if leave were to be granted. [citation omitted.] We of course are not bound by the Eighth Circuit's statement. In our view it conflicts with Foman, where the Court listed "undue delay" as a ground sufficient to deny leave. Foman, 371 U.S. at 182. Moreover, we ourselves recently listed delay as an independent reason to deny leave to amend.

First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc., 820 F.2d 1127, 1133 (10th Cir. 1987).

Plaintiffs' discussion of prejudice, then, is irrelevant; their extensive delay in proposing amendments to the complaint is all the Court need evaluate to deny Plaintiffs' motion.

Plaintiffs also seem to suggest that their motion to amend is proper because they filed it within the time set by Magistrate Judge Boland for joinder of parties and amendment of pleadings. See Scheduling Order, p. 14 [Docket #32] (setting deadline of July 20, 2004). But nothing in the Scheduling Order purports to trump Federal Rule of Civil Procedure 15(a). To the contrary, the Scheduling Order merely set the date by which all motions to amend the complaint must be filed. It in no way purported to grant any motion filed before that time. And where Plaintiffs seek leave to amend the complaint to add information and a defendant that could have been in their original complaint or their first amended complaint, the fact that they moved the Court on the final day that the Scheduling Order allowed can be no safe harbor. Plaintiffs needed to explain to the Court their delay, and they have not even attempted to do so.

Conclusion

For the foregoing reasons, the Court should deny Plaintiffs' motion for leave to amend their complaint.

Dated: August 9, 2004

Respectfully submitted,

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Certificate of Service

I certify that, on August 9, 2004, I caused a copy of the foregoing Opposition to Plaintiffs' Motion for Leave to Amend to be served by first-class mail, postage prepaid, upon counsel at the following address:

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