

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

CELIA VALDEZ, et al.

Plaintiffs,

v.

MARY HERRERA, in her official capacity
as New Mexico Secretary of State, et al.

Defendants.

CIVIL ACTION NO. CV-09-0668 JH/DJS

Plaintiffs' Objection to Magistrate's Report and Recommendation

Plaintiffs submit the following objection in response to the Magistrate's April 14, 2010 Report and Recommendation regarding Plaintiffs' Motion for Leave to File a First Amended Complaint. In his Report and Recommendation, the Magistrate recommends that the Court (1) grant Plaintiffs' motion insofar as Plaintiffs seek to clarify their substantive allegations and substitute Shawna Allers for Plaintiff Roanna Begay, and (2) deny Plaintiffs' motion insofar as Plaintiffs seek to add class action allegations. Plaintiffs object to the Magistrate's second recommendation regarding the class action amendment.¹

Because the Federal Rules of Civil Procedure require that the Court "freely give leave [to amend] when justice so requires," Fed. R. Civ. Pro. 15(a)(2), and because Plaintiffs have fully met the requirements for being granted leave to amend their Complaint, this Court should grant Plaintiffs' motion to file the proposed Amended Complaint in its entirety, including the amended allegations seeking class action status.

¹ Defendants did not oppose Plaintiffs' request to clarify the substantive allegations, and to add a new named Plaintiff and drop another one, and Defendants have informed Plaintiffs that they do not intend to object to the Magistrate's recommendation that these aspects of the motion to amend be granted.

In this regard, it is important to emphasize that, at this stage of the litigation, the only question before the Court is whether Plaintiffs may allege a class action, not whether to the proposed plaintiff classes should be certified.

I. Procedural Background

As noted in previous filings, this case seeks to remedy Defendants' ongoing violations of Sections 5 and 7 of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973gg-3, 1973gg-5. The NVRA was enacted "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). Section 5 of the NVRA requires the State of New Mexico to include a voter registration application as part of every application for a driver's license or state identification card. Section 7 requires the State to offer voter registration as part of its public assistance process. However, as alleged in the Complaint, both the state Motor Vehicle Division and the state Human Services Department have failed to carry out these mandates and, as a result, thousands of New Mexico residents who are eligible to vote in the State have been unlawfully denied – and continue to be unlawfully denied – the opportunity to register to vote. Due to the large number of citizens affected by the state's NVRA violations, Plaintiffs seek leave to amend their Complaint to add class claims.²

In his Report, the Magistrate concludes that amending the Complaint to add class allegations would "serve no useful purpose," Report and Recommendation, at 4, and that the motion to amend in this regard is therefore futile. However, for the reasons set forth

² The proposed class definitions are set forth in the Prayer for Relief included in the proposed Amended Complaint (document 26-2, at 33-34), attached as an exhibit to Plaintiffs' Motion to Amend. Plaintiffs propose a class of motor vehicle license and identification card applicants, and a class of public assistance applicants and recipients.

below, Plaintiffs submit that, on the face of it, their suit fully qualifies for class action status and, therefore, the Magistrate's "futility" conclusion is incorrect.

II. Discussion

As set forth above, the Federal Rules of Civil Procedure require that leave to amend be "freely give[n]." Fed. R. Civ. Pro. 15(a)(2). The general policy favoring amendment is to be applied liberally, even where a plaintiff seeks to amend to plead new legal theories. *See Leaseamerica Corp. v. Eckel*, 710 F.2d 1470, 1473-1474 (10th Cir. 1983) (affirming grant of leave to amend because the amended complaint referred "to the same chattels, the same consideration, and the same transaction which was the basis for the original complaint."). Because of this liberal policy, motions for leave to amend are generally granted unless there has been bad faith, undue delay, or failure to cure deficiencies by previous amendments, or if the amendment would result in undue prejudice to the opposing party or if the amendment is futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Childers v. Independent School District*, 676 F.2d 1338, 1343 (10th Cir. 1982). Absent the presence of one of these factors, none of which exist here, leave to amend should be freely given. *Foman*, 371 U.S. at 182. *See also Duncan v. Manager, Dep't of Safety, City and County of Denver*, 397 F.3d 1300, 1315 (10th Cir. 2005); *R. E. B., Inc. v. Ralston Purina Co.*, 525 F.2d 749, 751-52 (10th Cir. 1975).

At the outset, it is important to note that the Magistrate did not find that Plaintiffs, in seeking to amend their Complaint, had engaged in bad faith or had delayed in filing their motion, or that an amendment to add class allegations would prejudice Defendants.³ Plaintiffs respectfully refer this Court to their Memorandum of Points and Authorities

³ Since this is Plaintiffs' first request to amend their Complaint, there is no issue with regard to any failure to cure Complaint deficiencies in previous amendments.

(document 27) and their Reply brief (document 34) in support of their motion, in which Plaintiffs discuss these factors and explain why they do not preclude Plaintiffs from being granted leave to file the Amended Complaint.

With regard to the issue of futility, as set forth in particular in Plaintiffs' Reply brief (at pages 6-11), Plaintiffs' proposed class claims are not futile. Plaintiffs have properly pled a class action in the proposed Amended Complaint, and a final determination on the merits as to whether this suit may be litigated as a class action should be made at a later date pursuant to a class action certification motion.

First, Plaintiffs' allegations in the proposed Amended Complaint satisfy the class action prerequisites of Rule 23(a): "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Defendants' violations of the NVRA have affected and continue to affect thousands of New Mexico citizens, Defendants' failures in policy and practice present questions of law and fact common to the proposed classes, the claims of the representative parties are essentially identical to the claims of the class members, and the named Plaintiffs will fairly and adequately protect the interests of the class members. Amended Complaint, at 30-32.

Second, Plaintiffs seek class certification under Rule 23(b)(2) because, as specified by that rule, the Defendants have "acted or refused to act on grounds that apply generally to the class[es], so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class[es] as a whole." Plaintiffs' Amended Complaint

alleges statewide failures by state agencies to offer voter registration to agency clients eligible to register to vote, Amended Complaint, at 15-26, 32-33, and thus alleges a course of action that “appl[ies] generally to the class[es].” It therefore follows that injunctive relief for the specified classes of New Mexico residents, not just the individual Plaintiffs, will be appropriate. Indeed, as the Advisory Committee to the Federal Rules noted with reference to the 1966 amendment to Rule 23, “[i]llustrative [of Rule 23(b)(2) class actions] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.”

Accordingly, the futility doctrine should not bar Plaintiffs’ amendment here. “A court usually invokes futility to deny an amendment that adds a new cause of action having *no hope* of surviving a subsequent motion to dismiss.” *Local 144 v. CNH Management Assoc.*, 713 F. Supp. 680 (S.D.N.Y. 1989) (emphasis added) (citing *Dan Caputo Co. v. Russian River County Sanitation Dist.*, 749 F.2d 571 (9th Cir. 1984)). Because Plaintiffs’ not only have a “hope” of establishing that this case meets the requirements for class certification but their allegations fully satisfy the required elements for class certification, the requested amendment is not futile. Thus, the Court should permit its filing.

To be sure, the Court need not decide at this point whether to certify Plaintiffs’ proposed classes. That matter must first be briefed by both sides. All the Court need decide at this time is whether Plaintiffs may amend their Complaint. Under Rule 15(a)’s liberal requirement that leave to amend be “freely give[n]”, this Court should grant the instant motion.

Respectfully submitted this 3rd day of May, 2010.

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CERTIFICATE OF SERVICE

I CERTIFY that on the 3rd day of May, 2010, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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