

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

CELIA VALDEZ, GRACIELA GRAJEDA,  
ROANNA BEGAY, JESSE RODRIGUEZ,  
and ASSOCIATION OF COMMUNITY  
ORGANIZATIONS FOR REFORM NOW,

Plaintiffs,

v.

MARY HERRERA, in her official capacity as  
New Mexico Secretary of State, PAMELA S.  
HYDE in her official capacity as Secretary of  
New Mexico Human Services Department,  
FRED SANDOVAL in his official capacity as  
the Director of the Income Support Division of  
the New Mexico Human Services Department,  
CAROLYN INGRAM in her capacity as the  
Director of the Medical Assistance Division of  
the New Mexico Human Services Department,  
RICK HOMANS in his capacity as the  
Secretary of the New Mexico Taxation and  
Revenue Department, and MICHAEL  
SANDOVAL, in his capacity as the Director of  
the Motor Vehicle Division of the New Mexico  
Taxation and Revenue Department,

Defendants.

Case No. 1:09-CV-00688 JCH/DJS

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE  
TO AMEND THE COMPLAINT**

COME NOW the Defendants, New Mexico Human Services Department (“HSD”), New Mexico Taxation and Revenue Department (“TRD”), and New Mexico Secretary of State, Mary Herrera, by and through their counsel of record, New Mexico Attorney General’s Office, Adrian

Terry, Elaine Lujan, and Scott Fuqua, Assistant Attorneys General, and by way of response, oppose the Plaintiffs' motion to amend their Complaint.

Plaintiffs have moved to amend their Complaint to (i) add class allegations, (ii) clarify claims under Section 5 of the NVRA, and (iii) substitute Shawna Allers for Roanna Begay as a Plaintiff against Defendant HSD. The Defendants contend that Plaintiffs' motion to amend the Complaint should be denied for the following reasons:

- (1) Justice does not require amendment of the pleadings;
- (2) Amendment does not serve any legitimate purpose;
- (3) Amendment is prejudicial to the Defendants;
- (4) Denial of Plaintiffs' motion does not harm the merits of Plaintiffs' action;
- (5) Neither justice nor judicial economy will be served by the proposed amendments;
- (6) Certification of a class is unnecessary, unwarranted, burdensome, and expensive;
- (7) The proposed amendment does not impact the right and remedies of the parties.

#### DISCUSSION

##### **1. Leave to Amend is Discretionary**

Determining whether to grant leave to amend a pleading is an exercise in the Court's discretion. *State Distributors, Inc. v. Glenmore Distilleries, Co.*, 738 F.2d 405, 416 (10th Cir. 1984); *Foman v. Davis*, 371 U.S. 178, 182 (1962) (granting or denying the "opportunity to amend is within the discretion of the District Court"). In making its decision, the Court must

consider that the purpose of granting leave to amend is two fold: (1) to facilitate a decision on the merits, and (2) to ensure that all issues related to a specific transaction or occurrence are before the Court. *Filmtec Corp. v. Hydranautics*, 67 F.3d 931, 935 (Fed. Cir. 1995); 3 Moore, Federal Practice (3d ed. 2009), § 15.14[1]; *see also Minter v. Prime Equip. Co.*, 451 F.3d 1196 (10th Cir. 2006).

In the present action, granting Plaintiffs' leave to amend their complaint to include class allegations is unnecessary to facilitate a decision on the merits, to wit: whether the State of New Mexico, through its executive agencies HSD and TRD, violated the NVRA. Furthermore, all issues related to alleged failures to comply with the NVRA by HSD and TRD are already before the Court. The quantity of plaintiffs does not relate to whether the Defendants violated the NVRA over any definable period of time.

## **2. Leave Should Not Be Granted Automatically**

Although leave to amend is freely granted, such leave is not automatic and the court should consider certain factors that would preclude amendment, such as bad faith and dilatory motive. *First City Bank, N.A. v. Air Aircraft Sales, Inc.*, 820 F.2d 1127, 1132 (10th Cir. 1987) (citing *Foman v. Davis*, 371 U.S. 178); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1184 (7th Cir. 1986) (delay and prejudice may preclude automatic grant of amendment).

The case at bar is an action that highlights the reasons for limitations to amendment of the pleadings. As proposed, the Amended Complaint is not offered to cure any deficiency related to the sufficiency of claims, jurisdictional defects, or otherwise. *See* Clerk's File, Motion for Leave to File First Amended Complaint, Exhibit A (Document #26-2). Principally, the Amended Complaint is offered to add class action claims to a legal proceeding that can, and should, be

adjudicated without regard to the number of plaintiffs. In fact, the likely outcome of permitting the Plaintiffs to amend their complaint to add class allegations is protracted litigation, burdensome discovery, and considerable additional expense by all parties.

### **3. Factors for Judicial Consideration on Motion for Leave to Amend Pleadings**

According to the landmark case on this topic, *Foman v. Davis*, 371 U.S. 178, the Court may deny a motion to amend for the following reasons: (1) undue delay, (2) bad faith or dilatory motive by the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party, (5) and futility of the amendment. *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-331 (1971). Subsequent federal cases, in multiple circuits, regarding amendments to pleadings have identified another factor for consideration, judicial economy. *Chitimacha Tribe of La. V. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982) (“In keeping with the purposes of the rule, the court should consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation”); *Perrian v. O’Grady*, 958 F.2d 192, 195 (7th Cir. 1992) (justification for denying leave includes prejudice to judicial system and public’s interest in prompt resolution of disputes, even if there is no prejudice to the opposing party).

In the action before the Court, at least four factors are present that justify denial of Plaintiffs’ motion for leave to amend their Complaint.

#### **a. Undue Delay**

First, permitting amendment to add class allegations would create and foster undue delay in meeting and sustaining the requirements of Rule 23. Identification and certification of a class of Plaintiffs would be time consuming, burdensome, and expensive with no perceivable impact

on any decision on the merits. Class allegations would further require notice and consent from class members as to many substantive issues in this case. However, the addition of a class of plaintiffs would not have any impact on any determination by the Court as to whether the Defendants violated the NVRA.

**b. Undue Prejudice to Defendants**

Second, permitting amendment to add class allegations would impose undue prejudice on the Defendants. Fundamentally, and without exception, the addition of class allegations would cause undue delay as stated above, drastically increase the scope of discovery, contribute to additional and protracted litigation expense, and result in an exponential increase in attorneys' fees. *See e.g. Ruotolo v. City of New York*, 514 F.3d 184, 192 (2d Cir. 2008) (in order to gauge prejudice, the Court should consider, among other things, whether amendment would require the opponent to expend significant additional resources to conduct discovery and prepare for trial, or would significantly delay resolution of the dispute).

**c. Futility of Amendment**

Third, permitting amendment to add class allegations would be futile as related to the legal determination of whether the Defendants violated the NVRA. Plaintiffs' allegations in the Complaint, as well as the proposed Amended Complaint, rest on the contentions that HSD and TRD failed to implement policies and procedures to ensure that applicants for assistance (HSD) and driver's licenses (TRD) received the opportunity to register to vote as afforded by the NVRA. Any legal determination by the Court related the sufficiency of practices and programs instituted by HSD and TRD under the NVRA shall be based on such practices and programs, not the numerosity of plaintiffs.

**d. Judicial Economy**

Fourth, permitting amendment to add class allegations will not serve judicial economy. The objective of the judicial process is “to secure the just, speedy, and inexpensive determination of every action.” *See* Fed. R. Civ. P. 1. In consideration of the foregoing, the amendments proposed by the Plaintiffs are contrary to the purposes and objectives of the Rules of Civil Procedure, as well as fundamental principles of jurisprudence.

**4. Balancing of Harms and Prejudices**

Full consideration of whether to permit amendment of the Complaint by the Plaintiffs requires the Court to balance the prejudice to the Defendants if leave to amend is granted against the harm to the Plaintiffs if leave to amend is denied. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981) (in consideration of the *Foman* factors, the court may weigh the prejudice to the non-movant if leave is granted against the harm to the movant if leave is denied).

The Defendants have identified at least four grounds for which the Plaintiffs’ motion for leave should be denied. The Plaintiffs, however, only identify two principal reasons to grant amendment: (1) the case is at an early stage; and (2) the Plaintiffs are acting in good faith. *See* Clerk’s File, Motion for Leave to File First Amended Complaint (Document #26), p. 2. Additionally, Plaintiffs expressly admit that “[t]he proposed Amended Complaint does not involve any change in the law applicable this case” and “it does not involve any change in Plaintiffs’ legal and factual claims...”. *See* Clerk’s File, Plaintiffs’ Memorandum of Points and Authorities in Support of Motion for Leave to File a First Amended Complaint (Document #27), p. 4; *see also Chitimacha Tribe of La. V. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (“the court

should consider whether the amendment adds substance to the original allegations, and whether it is germane to the original case of action”).

5. Plaintiffs Do Not Meet the Requirements of Fed. R. Civ. P. 23 for Class Actions

In order to establish a class action, the Plaintiffs must establish, among other things, the following prerequisites: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact in common to the class; (3) the claims or defenses of the representative parties are typical of the claims and defenses of the class; and (4) the representative parties will fairly and accurately protect the interests of the class. Fed. R. Civ. P. 23(a).

In order to certify a class, a class must exist and “be susceptible of precise definition.” 5 Moore, Federal Practice (3d ed. 2009), § 23.21[1]; *see cf.* Fed. R. Civ. P. 23(c)(1)(B). According to generally accepted legal principles,

[t]he standard for measuring whether a class has been defined with sufficient precision is whether the definition makes it administratively feasible for the court to determine whether a particular individual is or is not a member of the proposed class. A class action is possible only when the class definition provides a court with tangible and practicable standards for determining who is and who is not a member of the class.

5 Moore, Federal Practice (3d ed. 2009), § 23.21[1]; *Crosby v. Social Sec. Admin.*, 796 F.2d 576, 580 (1st Cir. 1986); *Cook v. Rockwell Int’l Corp.*, 151 F.R.D. 378, 382 (D. Colo. 1993).

In the present case, Plaintiffs have failed to identify a definable class as evidenced by the following statements:

1. “Plaintiffs Allers and ACORN seek to represent the class of all residents of the State of New Mexico, past, present, and future, who are eligible to vote in New Mexico, are not registered to vote at their current residence address, have applied for public assistance through an HSD office or have requested recertification or renewal or submitted a change of address

relating to public assistance through an HSD office, and in that transaction were not provided by the HSD office with a voter registration application, were not offered assistance in completing a voter registration application by the HSD to the same degree that the HSD provides assistance in completing public assistance forms, were not provided such assistance (unless refused by the applicant or recipient) by the HSD and/or were not provided with a voter notice form by the HSD.” *See* Clerk’s File, Motion for Leave to File First Amended Complaint, Exhibit A (Document #26-2, ¶ 85).

2. “Plaintiffs Valdez, Rodriguez, and ACORN seek to represent the class of all residents of the State of New Mexico, past, present, and future, who are eligible to register to vote in New Mexico, are not registered to vote at their current residential address, have applied for a motor vehicle driver’s license or state identification card or the renewal of a license or identification card, or submitted a change of address form for purposes of a license or identification card, and whose application for license or identification card did not also serve as a simultaneous application for voter registration, or whose change of address did not also serve as notification of a change of address for voter registration (unless stated otherwise by the individual).” *See* Clerk’s File, Motion for Leave to File First Amended Complaint, Exhibit A (Document #26-2, ¶ 86).

In addition to the prerequisites established in Rule 23(a), a class action may only be maintained where (1) prosecuting separate actions by individual class members would create either the risk of inconsistent adjudications or individual adjudications that would be dispositive of the interests of other class members, (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole, and (3) the court finds questions of law or fact common to the class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b).

Because of the nature of NVRA, adjudications related to whether a state actor violated the Act based on a specific act, transaction, or occurrence cannot be inconsistent as between plaintiffs. Consequently, individual adjudication of the merits of this action cannot, and would not, be contrary to the claims, rights, or remedies of any other potential plaintiff. Furthermore, injunctive or declaratory relief for any one plaintiff would be appropriate to any other potential plaintiff, as well as the public-at-large. As such, amending the complaint to add a class allegation is unnecessary and contrary to the purpose of the civil rules, namely, to secure just, speedy and inexpensive determination of legal actions.

#### CONCLUSION

WHEREFORE, the Defendants respectfully request the Court to deny Plaintiffs' Motion for Leave to File First Amended Complaint.

DATED this 16th day of October, 2009.

Respectfully Submitted,

GARY K. KING  
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that the Defendants' Response to Plaintiffs' Motion for Leave to Amend the Complaint was served on the parties of record via the CM/ECF case filing system for the United States District Court for the District of New Mexico on this 16th day of October, 2009.

s/Adrian Terry

Adrian Terry