IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES MADISON PROJECT	*	
Plaintiff,	*	
v.	*	Civil Action No. 08-0708 (JR)
CENTRAL INTELLIGENCE AGENCY et al.	*	
Defendants.	*	

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT OR, ALTERNATIVELY, NOTICE OF INTENT TO SEEK LEAVE OF THE COURT TO FILE AN AMENDED COMPLAINT

Plaintiff James Madison Project ("JMP")[1] commenced this litigation pursuant to the Freedom of Information Act ("FOIA") to obtain copies of internal Central Intelligence Agency ("CIA") documents pertaining to an internal review of the CIA's Inspector General, John Helgerson ("Helgerson"), and of the Office of the Inspector General ("OIG"). As the litigation ensued and details surrounding the internal review came to light by way of the media, JMP continued to submit FOIA requests to the CIA and two other federal agencies, the Federal Bureau of Investigation ("FBI") and Department of Justice ("DOJ"), in an effort to formulate a complete picture of the decisions that started the review, how the review was conducted, the manner in which recommendations would

[1] JMP (*http://www.jamesmadisonproject.org*) is a Washington, D.C.-based non-profit organization that was created in 1998 for the primary purpose of educating the public on issues relating to intelligence gathering and operations, secrecy policies, national security, and government wrongdoing. Much of the work undertaken by JMP involves litigation under FOIA.

be implemented, and the roles that the different agencies played in conducting and evaluating the review.

On November 14, 2008, JMP filed its First Amended Complaint ("FAC"), incorporating three additional FOIA claims and two additional defendants, the FBI and DOJ. On November 20, 2008, before JMP had even served the FAC on the FBI and DOJ, the defendants filed a Motion to Dismiss the First Amended Complaint ("Government's Motion"). By way of certified mail, the FBI and DOJ were served on November 25, 2008.

The Government's Motion relies upon two principal arguments: (1) that the additional claims constituted supplemental—not amended—pleadings and therefore required leave of the court pursuant to Federal Rule of Civil Procedure Rule 15(d) ("FRCP"); and (2) that even if the additional claims are construed as amendments pursuant to FRCP 15(a), they implicated FRCP 21 because they involved adding two additional parties to the litigation and therefore required leave of the Court. As will be demonstrated below, both of these arguments are without merit. Accordingly, the Government's Motion should be denied. In the alternative, JMP hereby respectfully gives notice that it will seek leave of the Court to file an Amended Complaint (within whatever period of time the Court desires).

ARGUMENT

I. JMP IS ENTITLED TO FILE AN AMENDED COMPLAINT WITHOUT LEAVE OF THE COURT PURSUANT TO FRCP 15(a)

A. The Additional Claims Do Not Constitute Supplemental Pleadings And Therefore Do Not Implicate FRCP 15(d)

The D.C. Circuit defines "amended pleadings" for purposes of FRCP 15(a) as relating to "matters that occurred prior to the filing of the original pleading." 6A Charles Alan Wright & Arthur R. Miller, Federal Practice And Procedure § 1504, at 184 (2d ed. 1990)("Wright & Miller"), Hall v. CIA, 437 F.3d 94, 100 (D.C. Cir. 2006); United States v. Hicks, 283 F.3d 380, 385 (D.C. Cir. 2002). It also defined "supplemental pleadings" for purposes of FRCP 15(d) as setting forth "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Id. The Circuit further explained that Rule 15(d) is used to "set forth new facts that update the original pleading or provide the basis for additional relief; to put forward new claims or defenses based on events that took place after the original complaint or answer was filed; [or] to include new parties where subsequent events have made it necessary to do so." Hicks, 283 F.3d at 386, citing Wright & Miller at 177-183. The Circuit has been clear in holding that supplements, unlike amendments, always require leave of the court. See Hall, 437 F.3d at 100; Hicks, 283 F.3d at 385.

The Government chose to confine its assertion that JMP's additional claims constituted supplemental rather than amended pleadings to a single footnote consisting of a single quote that failed to provide any semblance of context pertaining to the basis for that quote. See Memorandum of Points and Authorities in Support of Central Intelligence Agency's Motion to Dismiss First Amended Complaint (filed Nov. 20, 2008)

("Government's Memo") at 2 n.1 ("The Court stated that the addition of the new FOIA request [by the plaintiff] is plainly a supplemental pleading as defined by Federal Rule of Civil Procedure 15(d), as it sets forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.")(internal quotations omitted), quoting Hall, 437 F.3d at 100. The Government asserts, albeit in an indirect manner, that the additional claims constitute supplemental pleadings for the sole reason that the incorporated FOIA requests were filed after the date of the original complaint. See Government's Memo at 2-3.[2]

The factual context in Hall, though, evinces a situation far different than the three claims at issue in this litigation. Five years into the Hall litigation, the "new FOIA request" in question had been incorporated into a motion for leave to file an amended complaint. Hall v. CIA, 2005 U.S. Dist. LEXIS 6638, *3-*4 (D.D.C. Apr. 13, 2005)("Hall II"); Hall v. CIA, 2003 U.S. Dist. LEXIS 26397, *4 (D.D.C. Nov. 13, 2003)("Hall III"). The new claim was seeking agency records of the actual searches conducted by the agencies in the processing of the original three FOIA claims. Hall II at *3-*4. In his memorandum denying the motion, Judge Friedman explained that this new FOIA claim was separate in "time and substance" from the earlier requests. Hall III at *4. In contrast, all three of JMP's additional claims relate to the same time period and subject matter that was at issue in the original FOIA claim, namely the CIA's internal investigation into the conduct of its own Inspector General, John H. Helgerson. Nor has

[2] The other cases cited to by the Government do little if anything to further delineate the basis upon which claims are identified as supplements as opposed to amendments. Indeed, their only relevance appears to be that they all reaffirm the assertion that supplemental pleadings require leave of the court. See Government's Motion at 2. That issue is not in dispute in this litigation and therefore has little relevance with respect to whether JMP's additional claims actually constitute supplemental pleadings.

the CIA claimed, much less proven, that any prejudice would befall it were these additional claims to be permitted.

It is not necessarily new or unique to construe these claims as amendments rather than supplements. In a FOIA suit over Food and Drug Administration ("FDA") records pertaining to the "Plan B" medication, the organization Judicial Watch sought records pertaining to correspondence between Senator Clinton and the FDA. Judicial Watch, Inc. v. FDA, 514 F. Supp. 2d 84 (D.D.C. 2007). One month after filing suit on that claim, Judicial Watch submitted two additional FOIA requests seeking correspondence between the FDA and Senators Murray and Enzi pertaining to "Plan B" medication. Two months later (and one month after the FDA filed a motion to dismiss or, alternatively, for summary judgment), Judge Lamberth granted Judicial Watch's motion for leave to file an amended complaint to incorporate the Murray and Enzi requests. Id. at 85-86.[3] There is no indication in Judge Lamberth's ruling that the additional claims should have been identified as supplements instead of amendments and every indication that the FDA did not even raise that argument. Id. at 86.

In light of the arguments above, JMP's additional FOIA claims should be construed as amendments, not supplements, and therefore fall within the purview of FRCP 15(a). Accordingly, JMP was not required to seek leave of this Court pursuant to FRCP 15(d) and is, in fact, entitled to amend its' original Complaint as a matter of course. Therefore, the Government's Motion should be denied.

[3] That Judicial Watch sought leave to amend its original pleading, as opposed to amending it as a matter of course, has no bearing on the issue of whether JMP is required to do so as well. Judge Lamberth's decision does not indicate if any responsive pleadings were filed prior to Judicial Watch's motion for leave. Even if Judicial Watch chose to seek leave when it was not required to do so, that would not thereby impose an obligation upon JMP to follow suit.

B. To The Extent That They Conflict, FRCP 15(a) Trumps FRCP 21

The D.C. Circuit has held that plaintiffs have an absolute right to amend a complaint once at any time so long as the defendant has not served a responsive pleading. James v. Hurson Assocs., Inc. v. Glickman, 229 F.3d 277, 282-83 (D.C. Cir. 2000). See also Confederate Memorial Ass'n v. Hines, 995 F.2d 295, 299 (D.C. Cir. 1993)(finding that a motion to dismiss is not a responsive pleading). While the courts have recognized that there may ultimately be a conflict with the requirements of FRCP 21 in situations involving the addition of additional parties, they have not stated that leave of the court is required to add an additional party prior to the filing of a responsive pleading. Boyd v. District of Columbia, 465 F. Supp. 2d 1, 2-3 (D.D.C. 2006); Wright v. Herman, 230 F.R.D. 1, 4 (D.D.C. 2005); Adams v. Quattlebaum, 219 F.R.D. 195, 196 (D.D.C. 2004).

The Government, for its part, chose to rely exclusively upon several outdated and distinguishable non-binding cases from other jurisdictions as the basis for its assertion that, to the extent that they conflict, FRCP 21 trumps FRCP 15(a) and subsequently requires that leave of the court be sought prior to adding additional claims that require adding additional parties. See Government's Memo at 3-4. The Government has not cited—and cannot cite—to a single binding case that supports its assertion. Quite simply, the silence is not only telling, it is deafening.

The Government's clearest source of authority comes from a case decided thousands of miles away forty-five years ago. International Bhd. of Teamsters v. AFL-CIO,

32 F.R.D. 441 (E.D. Mich. 1963).[4] "An amendment to a complaint which adds or drops a party requires an order of the Court, regardless of whether it precedes or follows the first responsive pleading of any defendant." Id. at 442. The Michigan District Court concluded that when FRCP 21 and FRCP 15(a) conflict, FRCP 21 should be read to control. Id.

The devil though, as they say, is in the details. The court in International Bhd. cited to a single case from across the country that was at that time already ten years old as the supporting authority for its conclusion, Pacific Gas & Electric Co. v. Fireboard Products, 116 F. Supp. 377, 382 (N.D. Cal. 1953). What the CIA has not told this Court, however, is that for its part, the Northern District of California has largely repudiated the conclusion it reached more than half a century ago in recent years. See Matthews Metals Prods., Inc. v. RBM Precision Metal Prods., Inc., 186 F.R.D. 581, 583 (N.D. Cal. 1999)(concluding Rule 15(a), not Rule 21, read to control when two conflict and asserting that leave of court not required for amendment adding party prior to filing of responsive pleading). Cf. Maynard v. Bonta, 2003 U.S. Dist. LEXIS 16201, *23 (C.D. Cal. 2003)("The language of Rule 15(a) appears to establish an exception to the strict requirements of Rule 21."). Without more, the Government's argument that FRCP 21 should be read to control simply lacks merit.

[4] The other three cases to which the Government cited pertained to situations in which Rule 21 was found to require the movant to seek leave of the court because a responsive pleading had been filed. Age of Majority Educational Corp. v. Preller, 512 F.2d 1241, 1245-46 (4th Cir. 1975)(responsive pleading was filed); Commodity Futures Trading Commission v. American Metal Exchange Corp., 693 F. Supp. 168, 189 (D.N.J. 1988) (answer was filed); Madery v. International Sound Technicians, 79 F.R.D. 154, 156 (D.C. Cal. 1978)(answer was filed). The CIA did not file a responsive pleading in this case, thereby rendering these cases—to the extent they are even persuasive—relatively meaningless and easily distinguishable.

Accordingly, FRCP 15(a) should be read to trump FRCP 21 and relieve JMP of the need to seek leave of this Court to file its' Amended Complaint. Therefore, the Government's Motion should be denied.

II. ALTERNATIVELY, JMP RESPECTFULLY GIVES NOTICE OF ITS INTENT TO SUBMIT A MOTION TO SEEK LEAVE OF THE COURT TO FILE ITS AMENDED COMPLAINT WITHIN ANY PROSCRIBED PERIOD OF TIME DESIRED BY THE COURT

In the event that this Court concludes that JMP was in fact required to seek leave in order to file its' Amended Complaint, JMP respectfully is providing notice of its intent to file a Motion to seek leave to do so within whatever period of time permitted by this Court. This Motion would be quite straightforward as generally described below.

Of course, the grant or denial of leave lies in the sound discretion of the district court. Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996)(per curiam). The Court must, however, heed Rule 15's mandate that leave is to be "freely given when justice so requires." Id.; Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C., 148 F.3d 1080, 1083 (D.C. Cir. 1998). Indeed, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Foman v. Davis, 371 U.S. 178 (1962).

The D.C. Circuit has affirmed that a district court should grant leave to amend a complaint "in the absence of any apparent or declared reason—such as 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." Atchinson v. District of Columbia, 73 F.3d 418, 425 (D.C. Cir. 1996). District courts will find prejudice when the amendment substantially changes the theory of the case, would require significant new

preparation, or would result in a more complicated trial or comes years after the case began. See, e.g., Atchinson, 73 F.3d at 426-28 (upholding denial of motion for leave given litigation pending for two years, was set for trial day motion was made, and would have required additional discovery); Doe v. McMillan, 566 F.2d 713, 720 (D.C. Cir. 1977)(upholding denial of motion for leave to add new allegation and new defendant more than three years after litigation began). But see Djourabchi v. Self, 240 F.R.D. 5 (D.D.C. 2006)(granting motion for leave given that additional claims didn't change theory of the case and came before discovery had even been ordered).

As a precursor to what JMP would argue, the Government's Memo fails to demonstrate that permitting the addition of the additional claims and the two additional defendants will somehow prejudice the CIA. Indeed, no argument is even offered to this Court to persuade it that somehow prejudice might exist. Indeed, the Government's entire argument boils down to two self-serving, speculative and unsubstantiated sentences asserting that the additions will unreasonably delay the resolution of the case and that the CIA's ability to reach a just and speedy resolution of the litigation will therefore be prejudiced. See Government's Memo at 3.

Indeed, the Government cannot demonstrate that permitting these additional claims will prejudice the CIA. The additional claims do not change the theory of the case, particularly because they are simple FOIA claims virtually identical in subject and scope to the original claim in this litigation. This case itself is a mere seven months old, and JMP filed the FAC less than three months after initial briefing on the CIA's original

dispositive motion was completed. This Court has yet to even have the opportunity to adjudicate the merits of the CIA's original dispositive motion.[5]

Accordingly, the Government has failed to demonstrate and, in fact, cannot demonstrate that permitting the addition of the three additional FOIA claims and two additional defendants will prejudice the CIA. Therefore, JMP should be granted leave of the Court to file its' Amended Complaint.

CONCLUSION

For the foregoing reasons, the Government's Motion should be denied or, alternatively, JMP is providing notice of its intent to submit a Motion to seek leave to file an Amended Complaint.

Date: December 3, 2008 (revised per instructions of the Court – December 7, 2008)

[5] Moreover, given the unique nature of FOIA claims it is actually the CIA's actions, and especially the relief it requests, that would unduly delay this case as well as clog the Court's docket. Were the CIA to prevail on its argument the additional claims are not impacted in any way. They would not become moot. They are not past the statute of limitations. Instead, they would continue to exist independently and JMP would be forced to file a new lawsuit to pursue disclosure of the requested documents. Because the plaintiffs and defendants are the same and the scope of the request are the same, JMP would be compelled to submit the new case as a Related Case upon filing and it would likely, per review by the Calendar Committee, be assigned to this Court and possibly even consolidated. When balanced against what JMP is simply requesting here, i.e., amending the existing Complaint and proceeding forward in this litigation, the CIA's requested relief is far more harmful to the economy of the judicial system.

Respectfully submitted,

/s/

_____

Bradley P. Moss, Esq.
D.C. Bar #975905
Mark S. Zaid, Esq.
D.C. Bar #440532
Mark S. Zaid, P.C.
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 454-2809
(202) 330-5610 fax
Brad@MarkZaid.com
Mark@MarkZaid.com

Kelly Brian McClanahan
NYS Bar #4563748
Mark S. Zaid, P.C.
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
Kel@JamesMadisonProject.org

Of Counsel