IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ASSOCIATION OF REPTILE KEEPERS, INC., Plaintiff, - vs. - THE HONORABLE SALLY JEWELL, *et al.*, Defendants.	Civ. No.: 13-2007-RDM

UNITED STATES ASSOCIATION OF REPTILE KEEPERS MOTION
FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, Plaintiff United States Association of Reptile Keepers ("USARK"), through its counsel, respectfully moves this Court for leave to file a Second Amended Complaint.[1] As grounds therefore, Plaintiff provides as follows:

USARK filed its initial Complaint on December 18, 2012, challenging Defendants' rule entitled *Injurious Wildlife Species; Listing Three Python Species and One Anaconda Species as Injurious*. 77 Fed. Reg. 3330 (Jan. 23, 2012) (Dkt. No. 1). FWS filed a Motion to Dismiss this Complaint in its entirety on March 21, 2014. (Dkt. No. 14.) Defendants alleged that the *Ultra Vires* claim (Count One) was barred by the general federal six-year statute of limitations; USARK lacked prudential standing to assert claims arising under the National Environmental

[1] In accordance with LCvR 7(m), Plaintiff's counsel consulted with counsel for Defendants the Honorable Secretary Sally Jewell and the United States Fish and Wildlife Service (collectively, "FWS" or "Defendants") regarding this Motion. Federal Defendants' state that they oppose amendment of proposed Counts One through Three as futile, and do not oppose amendment as to proposed Counts Five and Six.

Policy Act ("NEPA") (Counts Two and Three); and that it failed to state a justiciable Administrative Procedure Act ("APA") claim (Count Four). On April 29, 2014, Judge Emmet G. Sullivan entered a Minute Order denying Defendants' Motion to Dismiss without prejudice and granting USARK leave to amend. USARK filed its First Amended Complaint on May 9, 2014, (Dkt. No. 21), and Defendants moved to dismiss as to all but Count Four on May 23, 2014, based on the same grounds as before. (Dkt. No. 22.) That Motion was submitted for decision on June 23, 2014, but to date no order has been entered.

This Second Amended Complaint[2] continues to challenge the January 2012 rule, but adds claims against Defendants' new rule, entitled, *Injurious Wildlife Species; Listing Three Anaconda Species and One Python Species as Injurious Reptiles*, promulgated on March 10, 2015. 80 Fed. Reg. 12702 (March 10, 2015). This new rule stems from the same proposed rule as the regulation already at issue in this case. *See* 75 Fed. Reg. 11808 (March 12, 2010) (FWS proposal to add nine species of non-native constricting snakes to the Lacey Act list of injurious species). As such, the March 2015 rule is related to the January 2012 rule and is based on substantially the same administrative record.

The Second Amended Complaint also includes additional Plaintiffs: Caroline Seitz, an environmental educator and small business owner; Dr. Raul Diaz, a university professor, herpetologist, and researcher; Matthew Edmonds, a hobbyist; and Benjamin Renick, owner and operator of a small reticulated python breeding and sales business. These Plaintiffs have personal, economic, scientific, and environmental interests in the rules at issue. Finally, Plaintiffs also add a new count requesting declaratory relief and a claim arising under the Regulatory Flexibility Act.

[2] In accordance with LCvR 7(i), a copy of the Second Amended Complaint is filed herewith.

The Court should allow Plaintiff to file their amended complaint because there has not been undue delay, defendants would not be prejudiced, and the amendments would not be futile.

ARGUMENT

Rule 15(a) provides that leave to amend shall be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). "Leave to amend a complaint should be freely given in the absence of undue delay, bad faith, undue prejudice to the opposing party, repeated failure to cure deficiencies, or futility." *Richardson v. United States*, 193 F.3d 545, 548-49 (D.C. Cir. 1999). The United States Supreme Court has declared that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Davis v. Liberty Mut. Ins. Co.*, 871 F.2d 1134, 1136 (D.C. Cir. 1989). Thus, the burden is on the opposing party to show that there is reason to deny leave. *In re: Vitamins Antitrust Litigation*, 217 F.R.D. 30, 32 (D.D.C. 2003). The Supreme Court explained that "if the underlying facts or circumstances relied upon by a plaintiff may be a proper source of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182.

The law is well-settled that leave to amend a pleading should be denied only where there is undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice, or futility of amendment. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). The grant or denial of leave to amend is committed to the sound discretion of the district court. *Anderson v. USAA Cas. Ins. Co.*, 218 F.R.D. 307, 310 (D.D.C. 2003).

I. Plaintiff is Entitled to Amend Its Complaint Because There Has Been No Undue Delay

Plaintiff has not unduly delayed bringing this Motion to Amend. It is being filed within ten days of Defendants' promulgation of the March 2015 rule. As the culmination of the same

rulemaking process that generated the 2012 listings, these cases should and, indeed, as a legal matter, must be heard jointly. This amendment could not have been made until Defendants finalized their rulemaking process.

Further, there has been no undue delay in refining Plaintiff's legal theory with respect to Defendants' unlawful application of the Lacey Act. As an initial matter, the United States Court of Appeals for the District of Columbia has held that "[w]here an amendment would do no more than clarify legal theories or make technical corrections . . . delay, without a showing of prejudice, is not a sufficient ground for denying the motion." *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999). Defendants can claim no prejudice from the refinement of USARK's statutory claims or the addition of new Plaintiffs. This Court has not determined USARK lacks standing to raise the NEPA claims, nor has it been determined that this Court lacks jurisdiction to adjudicate Count One. As such, Defendants' arguments on these counts aside, no prejudice results from USARK extending existing claims to cover the new listings nor from bringing new, judicially cognizable claims.

Defendants also cannot claim prejudice because this case is still at an early stage in litigation. *See Heller v. District of Columbia*, No. 08-1289, 2013 U.S. Dist. LEXIS 38833, at *8 (D.D.C. Mar. 20, 2013) ("A case's position along the litigation path proves particularly important in that [hardship] inquiry: the further the case has progressed, the more likely the opposing party is to have relied on the unamended pleadings."). There is thus no undue delay, and Plaintiff should be allowed to file its amended complaint.

II. Plaintiff is Entitled to Amend its Complaint Because Defendants Will Not Be Prejudiced

As discussed above, Defendants will not be prejudiced by Plaintiff' amended complaint. The "'liberal concepts of notice pleading embodied in the Federal Rules' is to make the

defendant aware of the *facts*." *Harrison*, 174 F.3d at 253 (emphasis added) (quoting *Hanson v. Hoffman*, 628 F.2d 42, 53 (D.C. Cir. 1980)). Accordingly, a plaintiff is not bound by the legal theories originally alleged unless a defendant is prejudiced on the merits. *Id.*

In its proposed Second Amended Complaint, Plaintiff adds a new claim arising under the RFA (Count Six), to which Defendants do not object. FWS does object, however, to the addition of the new count for declaratory relief and maintains its opposition to Count One. The basis for these objections is not prejudice, but rather futility. That claim is addressed below. For purposes of this test, it should be dispositive that Defendants do not claim to be prejudiced by having to answer an amended Complaint or defend new claims.

III. Plaintiff is Entitled to Amend Its Complaint Because Amendment is Not Futile

Plaintiff's proposed amendments are not futile. "A district court may deny a motion to amend a complaint as futile if the proposed claim would not survive a motion to dismiss." *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (citing *James Madison Ltd by Hecht v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996)). Under either Federal Rule of Civil Procedure Rule 12(b)(1) or 12(b)(6), the "Court must treat the complaint's factual allegations as true . . . and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000), quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979) (citations omitted; internal quotations omitted).

Under Rule 12(b)(1), the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "In deciding a Rule 12(b)(1) motion, it is well established in this Circuit that a court is not limited to the allegations in the complaint but may consider material outside of the pleadings in

its effort to determine whether the court has jurisdiction in the case." *Cristwell v. Veneman*, 224 F. Supp. 2d 54, 57 (D.D.C. 2002) (citing cases). "To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To establish standing at the "pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Bennett*, 520 U.S. at 167-68 (citations omitted).

Defendants contend that amendment of Counts One through Four is futile. Count One alleges that the FWS' purported authority to ban the listed snakes' transportation and movement in interstate commerce within the continental United States is *ultra vires*. Count Two requests declaration under the APA and the Declaratory Judgment Act ("DJA") that Plaintiffs cannot be subjected to criminal or civil penalties for engaging in these activities. Counts Three and Four arise under NEPA. All these claims are justiciable.

With respect to Counts One and Two, FWS apparently continues to believe that these claims are barred by the statute of limitations. *See* 28 U.S.C. § § 2401(a). Defendants can point to no agency action in the past relevant to the current listings of these snakes on which the time challenge has run. Notably, while USARK disagrees with Defendants' interpretation, Plaintiffs are no longer pursuing the claim to which the 1965 regulation even arguably applied. Defendants cannot credibly claim that a challenge to the prohibition on movements of the eight nonnative constricting snakes that is contained only in the preambles of these two rules is untimely. Moreover, the DJA exists so that Plaintiffs do not put themselves at risk of criminal prosecution merely to ripen a challenge to FWS unlawful arrogation of power not granted by Congress. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (quoting *Abbott*

Laboratories v. Gardner, 387 U.S. 136, 152 (1967)) ("The dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution—is 'a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.'").

As to the NEPA Counts Three and Four, USARK has already demonstrated its standing to raise these claims. Furthermore, the Second Amended Complaint adds Plaintiffs with broader and different interests. FWS is free to challenge their standing in a motion to dismiss if believes that position is supported by law and facts, but Defendants are not entitled to short-circuit these judicial processes. Differences over interpretations of the law do not amount to "futility." Rather, they are essence of an adversarial legal system. Amendment in this case is not futile.

IV. CONCLUSION

For the foregoing reasons, Plaintiff request that the Court grant it leave to file the attached Second Amended Complaint.

Dated: March 23, 2015

Respectfully submitted,

/s/ Shaun M. Gehan

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[PROPOSED] ORDER

Having considered Plaintiff United States Association of Reptile Keepers Motion for Leave to File a Second Amended Complaint, it is hereby ORDERED this _____ day of _____, 2015, that Plaintiffs' Motion is GRANTED.

Date: _____

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Honorable Randolph D. Moss
United States District Judge