

The Honorable Judge Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT REGINALD COMENOUT
SR., et al.,

Plaintiffs,

J. MARK KELLER, et al.,

Defendants.

NO. 3:16-CV-05464-RJB

STATE AND JUDICIAL
DEFENDANTS' JOINT RESPONSE
OPPOSING PLAINTIFFS' MOTION
FOR LEAVE TO AMEND
COMPLAINT (Dkt. 46).

I. INTRODUCTION

Plaintiffs' (the Comenouts) current motion for leave to amend should be denied. The motion untimely seeks to join parties, improperly seeks to relitigate futile claims, and fails to propose an amended pleading which complies with the Court rules. For these reasons and those stated below, the Court should deny Plaintiffs' instant motion for leave to amend and separately consider whether sanctions are appropriate against Plaintiffs and their attorneys.

II. STATEMENT OF FACTS

Plaintiffs' title their latest pleading as, "Plaintiff's Motion for Leave to File Third Amended Complaint," etc. Despite the title, Plaintiffs have not yet received the Court's permission to file a *first* amended complaint, let alone a *second* amended complaint (from which Plaintiffs may request leave to amend a complaint a *third* time). *See* Dkt. 42. To add to the confusion, this motion is actually Plaintiffs' fourth attempt to amend their declaratory

1 and injunctive claims against various State Defendants named in the above-entitled action.
 2 *See* Dkt. 18 (order dismissing judicial and state defendants, finding claims futile); Dkt. 26
 3 (Plaintiffs' first attempt to amend); Dkt. 35 (second attempt); Dkt. 42 (Court's order striking
 4 Dkt. 26 and denying Dkt. 35); Dkt. 43 (third attempt); Dkt. 44 (Plaintiff's withdrawal of
 5 third attempt); Dkt. 46 (Plaintiffs' fourth and current attempt); *see also* Dkt. 48 (Plaintiffs'
 6 either filing amendment to Dkt. 46-1, or filing an amended complaint without leave of the
 7 court).

9 Plaintiffs' proposed amended complaint asserted claims already made, dismissed
 10 and deemed futile by the Court. Dkt. 26. When the Court denied Plaintiffs' first two
 11 attempts several months ago, the Court cautioned the Comenouts and their counsel about the
 12 prudence of making further attempts to reassert dismissed claims:

14 The Court previously rejected the use of this case as a means to relitigate a prior
 15 case. Dkt. 18 at 5. Plaintiffs are cautioned to carefully consider the prudence of filing
 16 amended pleadings, if any. Plaintiffs are also cautioned that Fed. R. Civ. P. 8
 17 requires the complaint to be a short and plain statement.

18 Dkt. 42 at 3-4. Additionally, the Court set a deadline of December 29, 2016 for filing any
 19 motion to join additional parties. Dkt. 34 at 1.

20 In January 2017, Plaintiffs made their third attempt to amend their complaint and
 21 add parties. Dkt. 43. Again, Plaintiffs' proposed amended complaint asserted claims already
 22 made, and dismissed and deemed futile by the Court. *See* Dkt. 43-1. The Plaintiffs withdrew
 23 their third attempt after receiving a letter from the State Attorney General's office
 24 identifying several defects within the motion and proposed pleading. *See* Dkt.44.

25 On February 13, 2017, the Comenouts and their attorneys filed this fourth attempt to
 26 amend their complaint. Dkt. 46. Initially, Plaintiffs filed an amended complaint, motion for

1 leave to amend, and a proposed order in the Court's Electronic Case Filing (ECF) System.
 2 *See* Dkts. 45, 46, and 47. Plaintiffs' newest motion is nearly identical in text to the motion
 3 offered in its third attempt. *Compare* Dkt. 46 at 3, 4, 5 *with* Dkt. 43 at 3, 4, 5. Shortly after
 4 their filing, this Court issued orders striking Docket 45 and 47, and inserting them as
 5 attachments to the Motion (Dkt. 46) as "46-1" and "46-2."

6
 7 Plaintiffs' motion for leave to amend specifically argues: "[t]he allegations are not
 8 futile as facts and legal authority support the allegations... New Defendants and new causes
 9 of action have been added." Dkt. 46 at 4. Like its predecessors, in the proposed amended
 10 complaint Plaintiffs continue to assert claims already made, dismissed and deemed futile by
 11 the Court. *See, e.g.*, Dkt. 46-1 at ¶¶ 2, 3, 10, 11, 12, 13, 14, 15, 16, 17, 18 & pp. 29-65. Also
 12 like its prior unsuccessful attempts, the proposed amended complaint seeks leave to add
 13 additional agents of the Liquor Control Board, an administrative law judge, and Idaho police
 14 officers. The proposed amended complaint also seeks to name two previously unnamed
 15 state actors as defendants: the Hon. "Thomas J. Felnagle, Judge Pro Tem of Pierce County
 16 Superior Court", and "Dennis O'Brian, Pierce County Probation Officer." Dkt. 46-1 at 1.
 17 Plaintiffs' motion also certifies that there is no undue delay because "the case is not set for
 18 trial." Dkt. 46 at 4. However, the Court had issued an order setting trial for October 2017,
 19 prior to when Plaintiffs certified their pleading to the Court. *Compare* Dkt. 34 at 2 (dated
 20 Nov. 29, 2016); *with* Dkt. 46 at 4; *see also* Dkt. 43 at 4 (same).

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 22
 23 With respect to the Comenouts' (and their attorneys') certification of the current
 24 motion, the State Defendants have also filed a separate motion for sanctions pursuant to Fed.
 25 R. Civ. P. 11, which they have noted for consideration on March 24, 2017. *See* Dkt. 49. The
 26

State's motion for sanctions was served upon Plaintiffs twenty-one days prior to its filing with a safe harbor notice. Dkt 50 at 4-20.

III. AUTHORITY AND ARGUMENT

A. Joinder Of Additional Parties Is Untimely.

This Court filed a pretrial scheduling order pursuant to Fed. R. Civ. P. 16, which established a timetable for amending pleadings. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). On November 29, 2016, this Court issued a Minute Order Setting Trial and Pretrial Dates. The Order states that: "Deadline for the FILING of any motion to join parties" was December 29, 2016." Yet after this deadline, Plaintiffs request to add additional parties: Al Anderson, Raj Veluppillai, Tom Walsh, Douglas Smythe, Dennis O'Brian, Terry A. Schuh, and John and Jane Does 11 and 12. Such request is untimely.

Plaintiffs previously named the Pierce County Superior Court and Judges John and Jane Doe 1-10. While it is unclear from the documents filed by the Comenouts, the Defendants consider the Hon. Thomas J. Felnagle to be previously named (and dismissed) John Doe Judge 1. If the Plaintiffs intended to name Hon. Thomas J. Felnagle as a new defendant and not the unnamed Judge John Doe 1, then Plaintiffs request to join him after the deadline is also untimely.

A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril. *Johnson*, 975 F.2d at 610. Rule 16 was drafted to prevent this situation, and its standards may not be short-circuited by a call to the interests of Fed. R. Civ. P. 15. *Johnson* at 610-11. Nor does the Court generally treat an untimely motion to amend as a de facto motion to also amend the scheduling order. *Johnson*

1 at 608-09. A schedule may be modified only for good cause and with the judge's consent.

2 Rule 16(b)(4). Plaintiffs were served with the scheduling order.

3 Here Plaintiffs have not sought judicial consent to modify the deadline, nor has good
4 cause been shown. In fact, Plaintiffs wholly fail to acknowledge the existence of the
5 scheduling order, and even go so far as to deny that any case schedule has been set by the
6 Court. Dkt. 46 at 4 ("There is no undue delay in this case as no Discovery is calendared, no
7 status report is due and the case is not set for trial"); *but see*, Dkt. 34 (Court's order setting
8 discovery and joinder deadlines, and trial date). Furthermore, the other parties are entitled to
9 an opportunity to oppose a motion for relief from a deadline, should the Comenouts actually
10 make such a request.
11

12 The Comenouts' February 13, 2017, motion for leave to amend their complaint to
13 join new defendants violates this Court's Rule 16(b) ordered deadline. The Court should
14 deny Plaintiffs' current request to join: Al Anderson, Raj Veluppillai, Tom Walsh, Douglas
15 Smythe, Dennis O'Brian, Terry A. Schuh, and John and Jane Does 11 and 12, and any other
16 defendant not named in the original complaint or dismissed from it, including retired Judge
17 Felnagle.
18

19 **B. Leave To Amend Should Be Denied For Any Claim Deemed Futile.**

20 Plaintiffs also do not satisfy the civil rules for amending their pleading under Fed. R.
21 Civ. P. 15. Valid reasons for denying leave to amend under Rule 15 include undue delay,
22 bad faith, prejudice, and futility. *California Architectural Bldg. Prod., Inc. v. Franciscan*
23 *Ceramics, Inc.*, 818 F.2d 1466, 1472 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).
24 When a proposed amendment would be futile, there is no need to prolong the litigation by
25 permitting further amendment. *Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009). In
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1 this case, this Court has already stated with respect to Plaintiffs' claims against State
 2 criminal and tobacco jurisdiction that amendment would be futile. Dkt. 18 at 5. As if the
 3 Court's decision was not clear enough, this Court revisited the issue of relitigation with
 4 Plaintiffs. Dkt. 42 at 4. This Court specifically observed that it had "previously rejected the
 5 use of this case as a means to relitigate a prior case" and cautioned Plaintiffs to "carefully
 6 consider the prudence of filing amended pleadings." Dkt. 42 at 4.

8 Despite the Court's order and prior warning, the Comenouts *again* seek to relitigate
 9 the dismissed claims this Court judged futile. Specifically, Plaintiffs argue their allegations
 10 on criminal jurisdiction are not futile. *See* Dkt. 46 at 4. It provides no authority or
 11 explanation, or even discussion of why the prior order does not already control the outcome
 12 of these claims in the case or why the outcome should differ. And if the proposed amended
 13 complaint is accepted (as is), it would continue to assert claims already made, dismissed and
 14 deemed futile by the Court (*see, e.g.*, Dkt. 46-1 at ¶¶ 2, 3, 10, 11, 12, 13, 14, 15, 16, 17, 18
 15 & pp. 29-65).

17 Plaintiffs also seek to violate other aspects of the Court's prior orders. The proposed
 18 amended complaint would reintroduce a State judicial defendant, the Hon. Judge Felnagle,
 19 who had been previously dismissed as one of the unnamed "Judges John and Jane Doe." *See*
 20 Dkt. 18 at 10; Dkt. 46-1 at 1. The Court should not permit the Comenouts to do so.

22 In response to the prior warnings of the Court, the Comenouts argue only that:

23 [t]he allegations are not futile as facts and legal authority support the
 24 allegations. Plaintiffs have not filed similar complaints, causes or action and
 25 parties have been removed. New Defendants and new causes of action have
 26 been added.

Dkt. 46 at 4. But Comenouts' argument is flawed.

1 This Court has already dismissed the allegations based on the “facts and legal
 2 authority” briefed by the Comenouts in response to the motion to dismiss, and ruled that
 3 future amendments by the Comenouts would be futile. Dkt. 18 at 4-5. It goes beyond saying
 4 that this Court has already decided the Comenout’s claims in this action with respect to State
 5 criminal and tobacco jurisdiction “could not possibly be cured by the allegation of other
 6 facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). It is also evident that the
 7 Comenouts approach is to deny the Court’s order on relitigation, and not carefully address
 8 or provide nonfrivolous argument seeking reconsideration of the issue.

10 Plaintiffs also claim that “[n]ew Defendants and new causes of action have been
 11 added.” Dkt. 46 at 4. First, it is unclear if new claims have actually been added since
 12 Plaintiffs provide no specific details on new claims against the existing Defendants, and
 13 their proposed pleading lacks the necessary notations and is too prolix to discern the
 14 accuracy of the statement. But, more importantly, adding a new claim or defendant does not
 15 cure the defect of reasserting dismissed futile claims or untimely joinder of parties. Further,
 16 it is wholly unnecessary for the Comenouts to re-plead issues which were decided adversely
 17 against them. *See Serritella v. Markum*, 119 F.3d 506, 512 (7th Cir. 1997). This Court has
 18 amply cautioned Plaintiffs to be “prudent” in any future attempts to amend their complaint.
 19 The Court should deny this instant motion for leave to amend for purposes of reasserting
 20 dismissed and futile claims.

23 IV. CONCLUSION

24 The Comenouts quixotically latch on to the concept of liberal amendment, but
 25 liberal amendment does not excuse them from complying with the rules and orders of this
 26 Court. Plaintiffs bear the burden of comporting with these rules and the orders of this Court.

1 Any consequences of justice, speed, and expense for not doing so should fall upon them,
2 and not upon the other parties or judicial resources. Consequently, the Court should require
3 compliance with its rules and orders, and deny Plaintiffs' current motion for leave to amend.

4 DATED this 9th day of March, 2017.

5 ROBERT W. FERGUSON
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21 Attorneys for Defendants Pierce County
22 Superior Court, and John and Jane Doe Judges
23 1-10.
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2017, I electronically filed said pleading with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of March, 2017, at Tumwater, WA.

s/ Julie Johnson
Julie Johnson, Legal Assistant