

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
Baltimore Division

ALBERT SNYDER, *

Plaintiff *

v. * Civ. No.: 1:06-cv-01389-RDB

FRED W. PHELPS, SR., *
et al. *

Defendants. *

* * * * *

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND
THE COMPLAINT**

Defendants Fred W. Phelps. Sr., and Westboro Baptist Church oppose Plaintiff's motion for leave to amend the Complaint for the following grounds:

1. Plaintiff's Motion seeks to add party defendants by amendment to the complaint. "Although leave to amend should 'be freely given when justice so requires,' Fed. R. Civ. P. 15(a), the district court may deny leave to amend for reasons '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.'" *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d

222 (1962).” *Glaser v. Enzo Biochem, Incorporated*, 464 F.3d 474, 480 (4th Cir. 2006).

2. When considering whether to allow an amendment, "the trial court [is] required to take into account any prejudice" that might result to the party opposing the amendment. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31, *rehearing denied*, 401 U.S. 1015, (1971). Prejudice can be found in adding new parties, for instance:

Prejudice is generally found in cases characterized by some or all of the following circumstances: ... the amendment would cause undue delay in the final disposition of the case; *e.g.*, *Bradick v. Israel*, 377 F.2d 262 (2d Cir. 1967); *Johnson v. Sales Consultants*, 61 F.R.D. 369 (N.D. Ill. 1973); *Suehle v. Markem Machine Co.*, *supra*; the amendment brings entirely new and separate claims, **adds new parties**, or at least entails more than an alternative claim or a change in the allegations of the complaint; *e.g.*, *Collings v. Bush Mfg. Co.*, 19 F.R.D. 297, 22 Fed. R. Serv. 204 (S.D.N.Y. 1956); *Data Digests, Inc. v. Standard & Poor's Corp.*, *supra*; *Johnson v. Sales Consultants*, *supra*; *Suehle v. Markem Machine Co.*, *supra*; witnesses have become unavailable for examination and the memories of others may have dimmed; *e.g.*, *Data Digests, Inc. v. Standard & Poor's Corp.*, *supra*; *Kemwel Auto Co. v. Ford Motor Co.*, 10 Fed. R. Serv.2d 239 (S.D.N.Y. 1966); and, the amendment would require expensive and time-consuming new discovery; *e.g.*, *Data Digests v. Standard & Poor's Corp.*, *supra*; *McPhail v. Bangor Punta Corp.*, 58 F.R.D. 638 [*386] (E.D Wis. 1973); *Suehle v. Markem*, *supra*.

A. *Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Corp.*, 68 F.R.D. 383, 385-86 (N.D. Ill. 1975) (emphasis added).

3. The events at issue in this case occurred March 10, 2006, and the days immediately thereafter. Plaintiff seeks to add new defendants nearly a year later. The identity of these individuals was well known at the time of filing suit, and even before, on the www.godhatesfags.com website prominently covered in the original Complaint. Specifically, before the Complaint was filed, the webpage http://www.godhatesfags.com/featured/epics/2006/20060310_maryland-epic.pdf (which contains the online discussion of Plaintiff's son Matthew Snyder's death) already was online, and revealed the identities of the people who picketed outside Matthew Snyder's by identifying "Fred [Phelps] Sr., Shirl[ey Phelps-Roper], Becky [Phelps-Davis], Isaiah, Zacharias, Grace and Gabriel" as the picketers, and Shirl, once again, as the writer of that webpage. The original Complaint only lists Defendant Fred Phelps, Sr., by name as one of the picketers; the proposed Amended Complaint lists Shirley Phelps-Roper and Rebecca Phelps-Davis as picketers.

Moreover, a Google search using the search phrase of "'westboro baptist church' shirl 'shirley phelps'" yields numerous websites (see www.google.com/search?hl=en&q=%22westboro+baptist+church%22+shirl+%22shirley+phelps%22&btnG=Search (last visited February 22,

2007) showing "Shirl" and "Shirley Phelps" to be one and the same in relation to WBC.

Plaintiff and his counsel have indicated their knowledge of Shirley Phelps-Roper in at least two pleadings in this case. For instance, in Plaintiff's Motion to Enlarge Time for Joinder of Additional Parties and Amendment of Pleadings, filed December 22, 2006, Plaintiff's counsel named Shirley Phelps-Roper in paragraphs 11, 12 and 15, indicating clearly that Plaintiff's counsel knew she and some of her minor children were present at the protest about which they complain. Further, in Plaintiff's Motion for Award of Costs and Fees filed August 29, 2006, Shirley Phelps-Roper is referenced at paragraph 11 and footnote 1 in some detail, reflecting not only that Plaintiff's counsel knew Shirley Phelps-Roper's identity, but also follow her comments in the media (also supported by the hundreds of pages of material from the media and Web pages produced by Plaintiff in response to Defendants' request for production of documents in this case).

In this litigation, Plaintiff's counsel have been quick to make various comments and reach various sweeping conclusions about the members of Westboro Baptist Church in this case, reflecting what they apparently believe to be vast knowledge about WBC members' purpose and activities. Therefore, Plaintiff's counsel presumably knew about Shirley Phelps-Roper's

role in the activities about which Plaintiff complains, as early as March 2006, nearly a year ago. There is no valid reason for Plaintiff omission of Shirley Phelps-Roper in the original Complaint.

Furthermore, during this litigation, Plaintiff's counsel has claimed to know much about the Phelps, Chartered law firm. Seeing that Plaintiff's proposed new defendant Rebekah Phelps-Davis has been clearly listed as an attorney at Phelps, Chartered (see www.phelpschartered.com/RebekahAPhelpsDavis.htm) and that

http://www.godhatesfags.com/featured/epics/2006/20060310_maryland-epic.pdf lists "Becky" as being one of the picketers at Matthew Snyder's funeral, Plaintiff's counsel could have reasonably concluded before filing the Complaint that Rebekah Phelps-Davis was one of the picketers .

4. In addition, even if Plaintiff and his counsel did not in fact know for certain that Shirley Phelps-Roper and Rebekah Phelps-Davis had been among the picketers, Plaintiff's counsel had options to know earlier, including serving interrogatories earlier. Plaintiff's counsel could have earlier served the interrogatories they claim to have used to identify the picketers' names. Plaintiff's counsel failed to do so, and, therefore, caused further delay in this litigation.

5. The fact the Court has granted a motion to extend the deadline to move to amend, and that Plaintiff has filed his motion within the new deadline, does not mean that the timeliness requirement of Rule 15 has been satisfied, see *Amerisourcebergen Corporation v. Dialysist West, Inc.*, 465 F.3d 946, 953 (9th Cir. 2006). For a motion for leave to amend a complaint, in "assessing timeliness, we do not merely ask whether a motion was filed within the period of time allotted by the district court in a Rule 16 scheduling order. Rather, in evaluating undue delay, we also inquire 'whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading.' *Jackson [v. Bank of Hawaii]*, 902 F.2d [1385] at 1388 [(9th Cir. 1990)]; see also *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1492-93 (9th Cir. 1987), vacated on other grounds by *Union Oil Co. of California v. Sierra Club*, 485 U.S. 931, 108 S.Ct 1102, 99 L.Ed.2d 264 (1988). We have held that an eight month delay between the time of obtaining a relevant fact and seeking a leave to amend is unreasonable. See *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 799 (9th Cir. 1991) (citing *Jackson*, 902 F.2d at 1388)." *Amerisourcebergen*, 465 F.3d at 953.

5. The Fourth Circuit has in the recent past upheld a denial of a complaint amendment sought to be made beyond the scheduling order (for even less than eight weeks after the

deadline set for amending the complaint) where the information for amending the complaint was known no later than a few days after the deadline for amending pleadings. *Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir. 1993).

6. The undue delay has resulted in prejudice to the current defendants and proposed new defendants. Adding these defendants may lead to additional rounds of motions to dismiss; an additional scheduling conference with new and different time frames for discovery and other pretrial activities; duplication of discovery; and further delay in the case overall.

Further, substantial activity has occurred in this case which impacts the rights and interests of the new proposed defendants, yet they have had no legal representation in this litigation and have had no opportunity to be heard on the matter.

7. Plaintiff asserts that by identifying some John and Jane Does in the complaint, this put these two potential defendants on notice. However, the Complaint is broadly written; complains of language beyond anything written by either of these proposed defendants; generally is critical of the theology of all church members of Westboro Baptist Church; loosely uses the concept of a conspiracy; and otherwise is unique in its assault on words (which defendants respectfully submit is utterly contrary to the First Amendment) and its tone

of spite for the religious beliefs of defendants. That kind of a broad and unusual complaint would not put anyone notice that they were the intended defendants, or of anything else other than an intent by Plaintiff to use litigation to disagree with the religious beliefs and words of an entire church, with an announced purpose of silencing them. That is not sufficient notice to these two proposed new defendants that they were going to be named, and they are prejudiced by Plaintiff's unwarranted delay in trying to include them in the Complaint.

8. In *Pembroke v. City of San Rafael*, 1994 WL 443683 (N.D.Cal. 1994) at 2 (attached), the Court denied a motion to amend ten months after the identity of the proposed new defendants was known to plaintiff, saying:

Both the proposed and the existing defendants may be prejudiced by the amendment of the complaint at this late date because this motion was filed after the completion of discovery, the pre-trial proceedings, and trial preparation. The existing defendants have shown prejudice. The defendants have approached this case-based on a fair reading of plaintiff's complaint-as one for municipal liability based on an alleged pattern and practice of inadequate training and supervision. The addition of individual officers may well change the defense strategy. Defendants may well have pursued a different strategy had they known earlier-before the discovery cut-off and before preparing for trial-that plaintiff intended to name the individual police officers. Had the proposed defendants been timely named in this action, both they and the defense counsel might have chosen to proceed differently at the depositions.

Amendment at this late date would complicate and delay the case because the individual officers would be

entitled to conduct discovery, and may need additional time to prepare for the trial of this case. The existing defendants would be subject to additional discovery to accommodate the individual defendants. The individual officers would not be required to simply step in and accept this case as they find it, without being afforded the opportunity to prepare their own defenses. Although plaintiff lumps the existing and proposed defendants into a single group, each defendant is entitled to chart his own defense. The individual officers may wish to choose their own attorneys and prepare their own defenses, because they may be personally liable for any punitive damages awarded. The individual officers may take a different approach to the defense of this case than that taken by the existing defendants. Plaintiff does not explain why the existing and proposed defendants, rather than plaintiff, should suffer the consequences of her delay in bringing the individual officers into the case.

See also [Acosta-Mestre v. Hilton Int'l of Puerto Rico, Inc., 156 F.3d 49, 51-52 \(1st Cir. 1998\)](#) (motion to amend by adding new defendant brought one month before end of discovery period and fifteen months after initial complaint filed properly denied where allowing amendment would cause further delay in proceeding with additional costs and need for existing defendant to alter trial strategy).

WHEREFORE, for the foregoing reasons, Defendants move to deny Plaintiff's Motion for Leave to Amend.

Respectfully submitted

MARKS & KATZ, L.L.C.

_/s/ Jonathan L. Katz_____

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Counsel for Defendants Phelps and
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Opposition was served by the CM/ECF filing system on February 22, 2007, to:

Paul W Minnich, Esquire
Craig Tod Trebilcock, Esquire
Rees Griffiths, Esquire
Sean E Summers, Esquire

_____/s/ Jonathan L. Katz_____

Jonathan L. Katz