

causes further prejudice and delay to Defendants. Accordingly, Defendants request the Court to deny Plaintiff's Motion for Leave.

Background

Plaintiff filed this suit on April 6, 2010 against Judge Edwards, Adamick, Montgomery County, and LexisNexis. *Docket No. 1*. On May 4, 2010, Defendants Montgomery County and Adamick filed their motion to dismiss for failure to state a claim. *Docket No. 8*. Plaintiff filed her first amended complaint, as a matter of right under the Federal Rules of Procedure, on May 17, 2010. *Docket No. 11*.

Montgomery County and Adamick again moved to dismiss Plaintiff's complaint on June 1, 2010. *Docket No. 13*. Just five days later, and without leave of court, Plaintiff filed her second amended complaint; she also filed her response to Montgomery County and Adamick's motion to dismiss her first amended complaint the same day. *Docket Nos. 19 and 20*. LexisNexis filed its motion to dismiss on June 7, 2010. *Docket No. 22*. On June 9, 2010, Plaintiff filed her motion for leave to amend her first amended complaint upon prompting from the Defendants, all of whom opposed the motion for leave to amend. *Docket No. 36, 40, 42, 46*.

On June 30, 2010, following an oral hearing on Plaintiff's first motion for leave to amend, the Court granted Plaintiff's motion, allowing her to file the second amended complaint, but admonishing her that her claims should be clarified. *See June 30, 2010 Docket Entry*. Montgomery County and Adamick, LexisNexis, and Edwards then timely moved to dismiss the second amended complaint. *Docket Nos. 49, 51, and 56*. On July 20, 2010, Plaintiff filed a "motion to determine treatment of motions," in which she asked the Court to tell her which standard, the Rule 12(b)(6) dismissal standard, or the Rule 56 summary judgment standard, it would use to rule on Defendants' pending motions to dismiss. *Docket No. 60*. The Court declined Plaintiff's request, but allowed her additional time, until August 15, 2010, to respond to the pending motions to dismiss. *Docket No. 62*.

Despite the fact that Defendants spent time and resources fully briefing their motions to dismiss and awaited a ruling from this Court, on August 13, 2010, Plaintiff moved yet again to amend her complaint on the same day that she filed her responses to Defendants' motions to dismiss. *Docket Nos. 70–74*. Despite the Court's clear directions to Plaintiff regarding her second amended complaint, the proposed third amended complaint neither clarifies Plaintiff's claims nor survives scrutiny under Rules 12(b), 8, and/or 9(b). *See* FED. R. CIV. P. 8, 9(b), 12(b). It is also important to note that Plaintiff's attorney's time records indicate that he was working on the third amended complaint as early as July 9, 2010, well before Defendants had moved to dismiss the second amended complaint. *See Docket No. 75-1, Exhibit 1 to Montgomery County and Adamick's Reply to McPeters's Response to Defendants' Motion to Dismiss Second Amended Complaint.*

Summary of the Argument

Leave to amend is not automatic; instead, it is within the sound discretion of the trial court. *See Hunton v. Guardian Life Ins. Co.*, 243 F. Supp. 2d 686, 712 (S.D. Tex. 2001), *aff'd*, 71 F. App'x 441 (5th Cir. 2003). A court acts within its discretion in denying a plaintiff leave to amend under Rule 15 if (1) the plaintiff's amended complaint repeatedly fails to cure deficiencies from prior complaints or is not based on discovery of new facts, (2) the amendment would be futile because the plaintiff cannot state a claim for which relief can be granted, (3) granting the motion for leave would result in prejudice to other parties or undue delay, and/or (4) the amendment shows bad faith or dilatory motive on the part of the movant. For these reasons, Plaintiff's Motion for Leave should be denied. Alternatively, if this Court grants Plaintiff's Motion for Leave, Defendants should be awarded the costs associated with reviewing and responding to Plaintiff's third amended complaint.

A. This Court should deny Plaintiff leave to file her third amended complaint.

1. Plaintiff's third amended complaint should be denied because she fails to cure deficiencies from prior complaints and fails to allege facts based on newly discovered information.

Leave to amend should be denied when a plaintiff repeatedly fails to cure deficiencies from previous complaints. *Home Depot U.S.A., Inc. v. National Fire Ins. Co.*, CIVIL ACTION FILE No. 3:06-CV-0073, 2007 U.S. Dist. LEXIS 66696, at *7 (N.D. Tex. Sept. 10, 2007). Specifically, leave to amend is properly denied when the “amended claims are not the result of new information discovered in investigation...or disclosure of facts previously hidden by nonmovants.” *Baylor Univ. Med. Ctr. v. Epoch Group, L.C.*, CIVIL ACTION NO. 3:03-CV-2392-G, 2005 U.S. Dist. LEXIS 44681, at *28 (N.D. Tex. Sept. 1, 2005). When facts included in the amended complaint were known to the plaintiff when the original complaint was filed, a trial court may properly deny leave to amend. *In Re Southmark Corp.*, 88 F.3d 311, 316 (5th Cir. 1996 (citing *Layfield v. Bill Heard Chevrolet Co.*, 607 F.2d 1097, 1098 (5th Cir. 1979), *cert denied*, 446 U.S. 939 (1980))).

Plaintiff fails to cure deficiencies from her prior three complaints. Plaintiff's proposed third complaint is still grossly unorganized and lacking in sufficient clarity, despite the 56 pages of argument and 123 pages of exhibits. Further, Plaintiff's needs are not based on newly discovered facts, unavailable to Plaintiff in the course of drafting the prior three complaints. Plaintiff's proposed amended third complaint contains only legal theories that were readily available to her at the outset of this case. *See Hunton*, 243 F. Supp. 2d at 712. This is especially true given the work that went into the responses, the three previous complaints, the so-called ‘motion to determine treatment of motions,’ and the previous motion to amend that Plaintiff has filed in this case to date. *See Docket Nos. 1, 11, 20, 36, 60*. To the extent Plaintiff's third amended complaint differs from the prior complaints, it is with respect to new “threat” allegations. As for Plaintiff saying she has been subjected to a “new” threat,

nothing of the sort has occurred here. The certified copies of the Clerk's Office records show that her counsel's vacation letter, the subject of this alleged "new" threat, was filed by the Clerk's Office when sent in by Plaintiff's counsel. *See* Appendix, Tab 5, Exhibit 1.

Plaintiff has had more than ample time to contemplate and shape her causes of action against Defendants. Allowing her to amend her complaint yet again would occasion further delay and unduly burden Defendants, costing them further time and expense to respond to Plaintiff's bad faith and futile pleading. *See Hunton*, 243 F. Supp. 2d at 712. Defendants ask that Plaintiff's Motion for Leave be denied.

2. Plaintiff's Motion for Leave should be denied because it is futile.

Because Plaintiff fails to allege newly discovered facts, or otherwise cure deficiencies from prior complaints, leave to amend will be futile. An amended complaint is futile if it fails to state a claim upon which relief can be granted. *See DeLoach v. Woodley*, 405 F.2d 496, 496 (5th Cir. 1968); *see also Duzich v. Advantage Fin. Corp.*, 395 F.3d 527, 531 (5th Cir. 2004). To determine futility, the same standard of legal sufficiency that applies under Rule 12(b)(6) is employed. *Id.* As is detailed in Defendants' previous motions to dismiss, which are incorporated by reference herein, Plaintiff has failed to state any claim on which relief could be granted. *Docket Nos. 49, 51, 56.* Plaintiff's proposed amendment does nothing to defeat dismissal under 12(b) standards.

In *Hunton*, the United States District Court for the Southern District of Texas denied the plaintiffs' motion for leave to amend their complaint on the grounds, that the proposed amendment was unduly delayed and futile:

Plaintiffs have unduly delayed in requesting this amendment. This motion [to amend] was filed three months after the pleadings amendment deadline, months after Guardian's Motion to Dismiss was filed, and weeks after that motion was converted to a summary judgment action.

The matters Plaintiffs seek to add were (or should have been) known to them years ago. In fact, Plaintiffs seek to add new legal theories they could have asserted at the outset of this case. . . . The time for amending pleadings has long passed and Plaintiffs provide no probative reason for their delay.

In any event, Plaintiffs' proposed claims are futile. The additional contract theories are claims for ambiguity, reformation, and modification of the Policy. The parties have extensively briefed these issues as part [of] their submissions related to Defendant's Motion and the Court has ruled on each of them [herein]. Accordingly, Plaintiffs' motion for leave to amend their complaint to include the new contract theories of ambiguity, reformation, and modification of the Policy is denied.

Id. (footnote omitted).

Plaintiff's motion is futile, especially given that her new claims are also subject to dismissal under absolute immunity grounds, as well as all of the grounds previously articulated by Defendants in their motions to dismiss. *See Docket Nos. 49, 51, 56; Ackerson v. Bean Dredging*, 589 F.3d 196, 208–09 (5th Cir. 2009); *Duzich*, 395 F.3d at 531; *Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States of Co.*, 195 F.3d 765, 770–71 (5th Cir. 1999) (denying motion for leave to amend when any amendment would have been futile). As is detailed in Defendants' motions to dismiss, Plaintiff has failed to state any claim on which relief can be granted. *See Docket Nos. 49, 51, 56.* Her proposed amendment contains no new allegations, evidence, or information that would pass muster under Rule 12(b)(6). *See Docket No. 70.* It is improper, and her motion to amend warrants denial. *See FED. R. CIV. P. 15.*

In addition, when judicial immunity bars a litigant's claims against the judge who presided over her case, amendment is futile. *See generally Ackerson*, 589 F.3d at 208 (holding that denial of motion to amend was proper when the proposed amended complaint contained only "conclusory allegations and legal conclusions" that did not defeat the defendants' assertions of immunity); *see also Srivastava v. Newman*, 12 F. App'x. 369, 373 (7th Cir. 2001); *Partington v. Gedan*, 961 F.2d 852, 866–67 (9th Cir. 1992); *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986); *Sindoni v. Young*, No. 95-1205,

1995 U.S. App. LEXIS 26755, at *8 (4th Cir. Sept. 20, 1995) (unpublished opinion); *Dobard v. United States Dist. Court*, No. 93-17125, 1994 U.S. App. LEXIS 31282, at *6-7 (9th Cir. Nov. 4, 1994) (unpublished opinion). Thus, this Court should deny Plaintiff's Motion for Leave.

3. Plaintiff's Motion for Leave should be denied because it is in bad faith, dilatory and prejudices Defendants.

Here, much like the plaintiffs in *Hunton*, Plaintiff has obviously and unduly delayed in requesting this unnecessary amendment, which comes on the heels of extensive briefing of the parties' motions to dismiss *and a prior motion for leave to amend*. See *Hunton*, 243 F. Supp. 2d at 712. Defendants have already committed substantial time and resources in timely responding to all of Plaintiff's pleadings and filings in this case, including Plaintiff's latest motion for leave to amend. To add insult to injury, Plaintiff's attorney's time records indicate that he was working on the third amended complaint as early as July 9, 2010, well before Defendants had moved to dismiss the second amended complaint. See *Docket No. 75-1, Exhibit 1 to Montgomery County and Adamick's Reply to McPeters's Response to Defendants' Motion to Dismiss Second Amended Complaint*. Plaintiff now claims that she is entitled to amendment as she offers new or additional information in support of her claims, but this information is negated by the fact Plaintiff's attorney was drafting the third amended complaint in early July. See *Id.* Moreover, the information was either readily available to Plaintiff long before she filed her complaint, or is wholly inconsequential to her claims. Plaintiff should not be allowed to further waste the time and resources of the parties and the Court due to her own failure to properly research and shape her case, especially after this Court already provided her with an opportunity to amend her complaint.

Finally, Plaintiff's third amended complaint prejudices Defendants because it seeks to introduce exhibits which have no indicia of reliability or authenticity whatsoever. Included in the

exhibits to the proposed third amended complaint are three exhibits that should concern the Court: an affidavit from a lawyer named David Person regarding e-filing in the 9th District Court (Exhibit M); an undated document entitled “Comparative Expenses” (Exhibit Q); and a document dated August 8, 2010, entitled “How to Learn the LexisNexis Charges from the District Clerk’s Office” (Exhibit R). Exhibits Q and R are unsigned and Defendants know absolutely nothing about their origin. The Person Affidavit, Exhibit M, offers legal conclusions about the e-filing system. See Exhibit M, ¶ 10.² Mr. Person was not disclosed as a person with discoverable information, so Defendants are forced to ask if he is offered as a fact witness or an expert witness. Even if he is offered as an expert witness, he has not been disclosed. It appears this affidavit is merely offered to bolster the complaint and nothing more. But, neither it nor any of the other attachments to Plaintiff’s proposed third amended complaints offers any support whatsoever that would help Plaintiff overcome Defendants’ challenges to her claims. And none of these exhibits constitutes “new evidence,” which would warrant an amended complaint.

B. Defendants should be awarded costs if Plaintiff’s Motion for Leave to Amend is granted.

Courts may impose costs as a condition of granting leave to amend to compensate the other parties for increased costs imposed by the amendments. *See, e.g., General Signal Corp. v. MCI Telecomm’s Corp.*, 66 F.3d 1500, 1513-14 (9th Cir. 1995). If this Court grants Plaintiff’s Motion for Leave to Amend, Defendants request this Court assess against Plaintiff the attorneys’ fees and costs incurred by Defendants in responding to Plaintiff’s third amended complaint.

² In addition, this affidavit is irrelevant, as it has nothing to do with Plaintiff or her experience with e-filing and the court.

C. Conclusion

Defendants should not be forced to incur the expense of reviewing and responding to a complaint that could have been the original complaint had Plaintiff done her homework. Plaintiff's proposed amendment adds information that was known to her at the time of the filing of her Second Amended Complaint in June; fails to clarify or refine her current claims against Defendants; and includes inconsequential, unfounded accusations having absolutely nothing to do with her cases in front of Judge Edwards. The proposed third amended complaint is subject to dismissal, especially because Plaintiff's new "claims" and "facts" are still subject to dismissal on absolute immunity grounds, and amendment is therefore futile. Moreover, allowing Plaintiff to amend her complaint at this overripe stage in the 12(b)(6) proceedings would cause Defendants prejudice and unnecessarily delay the case. For all of these reasons and for all of the reasons that are discussed herein, Plaintiff's Motion for Leave should be denied.

Respectfully submitted,

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Certificate Of Service

I hereby certify that on Monday, August 30, 2010, a true and correct copy of the foregoing instrument was forwarded via electronic delivery pursuant to local rules, *to-wit*:

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