

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HEIN HETTINGA AND ELLEN HETTINGA)	
d/b/a SARAH FARMS, et al.,)	
)	Case No.06-CV-1637 (RJL)
Plaintiffs,)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

PLAINTIFFS’ MOTION TO FILE SUPPLEMENTAL COMPLAINT

Plaintiffs Hein Hettinga and Ellen Hettinga, doing business under the trade name Sarah Farms (“Hettingas”), and GH Dairy, doing business as GH Processing (“GH Processing”) (collectively “Plaintiffs”), move for leave of Court to file a supplemental Complaint, pursuant to Rule 15(d), *Federal Rules of Civil Procedure* and L. R. Civ. P. 7(i).¹ As explained in the incorporated memorandum, recent factual events necessitate that Plaintiffs’ First Amended Complaint now be supplemented.

This case involves plaintiffs’ claims that provisions of the Milk Regulatory Equity Act of 2005 (“MREA”) are unconstitutional. One of the claims for review is that the MREA is an unconstitutional Bill of Attainder prohibited by Article I, Section 9, Clause 3 of the Constitution. Among the elements that the plaintiffs must prove on this claim is that the MREA singles them out for punishment. These recent factual events provide corroborative and circumstantial evidence that Congress singled out plaintiffs for punishment through passage of the MREA.

Specifically, Senator Harry Reid of Nevada in his campaign for re-election has pointed to his involvement in the passage of the MREA as a basis for his return to office.

¹ Counsel for the plaintiffs has contacted government counsel regarding this non-dispositive motion pursuant to the requirements of L.R. Civ. P. 7(m). Counsel for the government has authorized us to state that they oppose the motion to supplement.

Senator Reid, a chief proponent of the MREA, has been touting the positive effects of the passage of the MREA on one of his important constituents, Anderson Dairy of Las Vegas, Nevada. The statements made in Senator Reid's campaign advertisement serve to corroborate the factual allegations made by plaintiffs in their First Amended Complaint related to the targeted and punitive nature of the MREA.²

Relevant Facts To Be Included in the Supplemental Complaint

Senator Reid is seeking re-election on November 2, 2010. On or about September 9, 2010, Senator Reid began running an advertisement which touts his efforts in allegedly preserving jobs for Anderson Dairy, one of the few milk processors located in Nevada, and a key constituent. In addition to running the ad on television, Senator Reid's campaign has posted the advertisement on the Internet site www.youtube.com.³

The political advertisement features David Coon of Anderson Dairy, who explains how "federal regulations were driving [Anderson Dairy] out of business." The advertisement further explains that Anderson Dairy employs 130 Nevadans, and that, "Harry Reid changed the Dairy Law so Anderson could compete. And saved the jobs." The advertisement directly cites the passage of the MREA as the change in the law that benefitted Anderson Dairy.⁴

Applicable Law Regarding Supplementation of the Complaint

The *Federal Rules of Civil Procedure* explicitly contemplate that events will occur after the filing of a Complaint that are relevant to the claims presented. Rule 15(d) specifies

² The statements made in Senator Reid's campaign commercial also serve to discredit the government's contention that the MREA is just another piece of ". . . valid economic regulation" as well as the Court's suggestion that the MREA is "no different than . . . amendments to the tax law." *See* Transcript of Oral Argument on Government's Renewed Motion to Dismiss Plaintiff's First Amended Complaint at 7-8.

³ "TV Ad: Staying in Business," http://www.youtube.com/watch?v=rrOldrn_43Y, (last visited September 22, 2010).

⁴ *Id.*, citing P.L. 109-215 (April 11, 2006).

when a pleading may be supplemented and vests this Court with discretion over when a party will be permitted to supplement its pleadings:

On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Fed R. Civ. P. 15(d).

The decision to permit the filing of supplemental pleadings is within the sound discretion of the trial court. *Quarantino v. Tiffany & Co.*, 71 F.3d 58, 65 (2d Cir. 1995). However, permission to supplement should be freely given when the supplemental facts are connected to the original pleading. *Id.* See also *Aftergood v. C.I.A.*, 225 F. Supp. 2d 27, 30 (D.D.C. 2002).

The only stated reasons to deny supplementation are when it will result in undue delay, unfair prejudice to defendant's interests, unfair surprise, or is the product of bad faith. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Aftergood*, 225 F. Supp. 2d at 30. Where the supplemented events are but a continuation of the defendant's conduct (as with Senator Reid's recent admission), such facts are precisely the type of conduct for which Rule 15(d) permits supplementation. *Wells v. Harris*, 185 F.R.D. 128, 133 (D. Conn. 1999).

The Supplemental Facts Support Plaintiffs' Claims

The Federal Rules are premised upon the policy that all cases are to be decided on their merits rather than on procedural technicalities. Moreover, this Court has decided that permission to supplement should be "freely given," when the "supplemental facts connect it to the original pleading." *Aftergood*, 225 F. Supp. 2d at 30. All considerations previously found by this Court to be important militate in favor of granting supplementation.

First, the temporal considerations favor allowing a supplemental Complaint. Here, Senator Reid's campaign commercial aired for the first time during the first week of September 2010, and this Motion was filed promptly thereafter. These events occurred well after the filing of the First Amended Complaint in 2007. Second, there is no prejudice that will be suffered by the government in permitting plaintiffs to supplement their Complaint. There is no dispositive motion deadline approaching, and this litigation is still in its procedural infancy. *See Bloche v. Dept. of Defense*, 2009 WL 1330388 at * 2 (D.D.C. May 13, 2009) (denying a motion to supplement where discovery was all but completed and dispositive motion deadline approaching); *Health Insurance Association of America v. Goddard Claussen Porter Novelli*, 213 F.R.D. 63, 66 (D.D.C. 2003) (denying supplemental pleading that would have introduced new claims against party not directly at issue in the case). Accordingly, the factors that might lead the Court to depart from the mandated "freely given" leave to supplement standard of Rule 15(d) are wholly absent.

Furthermore, the supplemental facts are tied directly to the claims already plead by the plaintiffs and the assertions of the Government made during prior oral and written argument to this Court. The paragraphs of the Complaint that plaintiffs move to supplement are numbered 5.1, 29.1, 31.1, 32.1, 52.6 and 52.7. The supplements all add to the factual bases for the plaintiffs' Bill of Attainder claim and do not seek to add additional claims or to amend the existing Bill of Attainder claim.⁵

The statements from Senator Reid are, in essence, the equivalent of statements of admission by a party opponent under Fed. R. Evid. 801. Senator Reid attempts in his

⁵ Indeed, in these circumstances, plaintiffs would be able to introduce a new cause of action not alleged in the original or amended Complaint. *See Aftergood*, 225 F. Supp. 2d at 30. Here, plaintiffs seek only to add facts to their existing Bill of Attainder claim.

campaign commercial to highlight his efforts to “preserve” jobs in Nevada. But his statements also illustrate that the MREA is, as alleged by the Hettingas, special interest dairy legislation intended to punish the Hettingas and to benefit large and powerful dairy industry interests, including Anderson Dairy.⁶

Conclusion

In filings with this Court and representations made in hearings before the Court, both the United States and *amici* have insisted that the MREA is merely a piece of garden variety economic regulation. In contrast to their claims, the statements by Senator Reid further establish that the opposite is true. Accordingly, plaintiffs should be granted leave to file a supplemental Complaint to incorporate these recent facts and new developments.

Respectfully submitted,

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⁶ See Beck, Glenn, Arguing With Idiots, 21-22, Simon and Schuster, Inc. 2009; Morgan, Dan, et al., “Dairy Industry Crushed Innovator Who Bested Price-Control System,” Washington Post, December 10, 2006.