

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-011290

05/01/2012

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT
D. Harding
Deputy

COMPASSION FIRST L L C, et al.

J TYRRELL TABER

v.

STATE OF ARIZONA, et al.

KEVIN D RAY

MINUTE ENTRY

The Court has had under advisement Plaintiffs' Motion for Leave to File a First Amended Complaint to Specifically Challenge One Additional ADHS Regulation as *Ultra Vires*. Plaintiffs seek this amendment to specifically challenge regulations imposing the requirement that a NPMMD have a medical director as a condition of registration and authorization to operate (the "medical director regulation").¹ Having read and considered the briefing and having heard oral argument, the Court issues the following ruling.

Leave to amend should be freely granted in the interests of justice absent undue delay, undue prejudice, or futility in the amendment. *Ariz. R. Civ. P. 15(a)*; *Owen v. Super. Ct.*, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982); *Bishop v. State Dep't of Corr.*, 172 Ariz. 472, 474-75, 837 P.2d 1207, 1209-10 (App. 1992). The Court may not deny leave to amend because of mere delay. *Owen, id.* Rather, a critical factor is whether the opposing party will be substantially prejudiced thereby. *Schoolhouse Educ. Aids, Inc. v. Haag*, 145 Ariz. 87, 91, 699 P.2d 1318, 1322 (App. 1985); *see Uyleman v. D.S. Rentco*, 194 Ariz. 300, 303, 981 P.2d 1081, 1084 (App. 1999). "Prejudice is the inconvenience and delay suffered when the amendment raises new issues or inserts new parties into the litigation." *Owen, id.* (internal quotation omitted); *cf.*

¹ Although captioned as one additional regulation, Plaintiffs actually challenge six separate regulations (with multiple subsections).

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Matter of Torstenson's Estate, 125 Ariz. 373, 377, 609 P.2d 1073, 1077 (App. 1980) (record did not indicate compelling reason for two-year delay in filing motion).

The medical director regulation is not a new one. When Plaintiffs filed their 23-page Complaint for Special Action in July 2011, they knew about the medical director regulation and knew it could be challenged as *ultra vires*. Plaintiffs do not explain so much as they sidestep why they delayed until after summary judgment had been granted on their Complaint to bring this challenge. Plaintiffs argue their Complaint was intended to challenge regulations as representative of *other ultra vires* and/or unconstitutional regulations, not to define a universe of challenged regulations; on this basis, DHS should have interpreted the Court's ruling that certain regulations were *ultra vires* to mean that the medical director regulation was as well. However, the record simply belies this argument. Plaintiffs requested the Court to order Defendants to promptly implement the AMMA and to enjoin them from considering applications and issuing dispensary registration certificates using the specific regulations challenged in the Complaint and Motion for Summary Judgment. (Pls.' Mot. for Summ. J. at 39.) The Court did precisely that. Plaintiffs did not request the Court issue an advisory opinion by which DHS would reevaluate the entire regulatory scheme, nor did the Court do so.²

Turning to the issue of prejudice, the Court notes that this is not a typical breach of contract or tort action. This is a special action of statewide importance and some urgency, and it proceeded on an expedited basis. Although Plaintiffs are not maneuvering to stave off dismissal or judgment against them, their request to amend comes post-summary judgment.³ The Court intended its January 2012 ruling to be case dispositive and that Defendants would comply therewith. Defendants have proceeded accordingly. DHS has implemented on an emergency basis revised regulations for the NPMMD application process, which have been widely reported. The Court's ruling and the revised regulations serve not only as a roadmap to applicants but as notice to the public that the AMMA will be implemented.

The time to add a car to this train was before it left the station, not as it was arriving at its destination. Plaintiffs have no explanation why their Complaint did not challenge the medical director regulation. Not only will Defendants be prejudiced by the late amendment, the public will be prejudiced by further delay and uncertainty arising from what would appear to be judicial vacillation. *See Alzheimer's Inst. of Am. v. Elan Corp. PLC*, 274 F.R.D. 272, 276 (N.D. Cal. 2011). The voters of Arizona intended those persons with debilitating medical conditions be

² Nor would the Court have done so had one been requested. *See* Jan. 17, 2012 Minute Entry at 8 (because Court found certain challenged regulations invalid, Court did not need to reach constitutional issues raised thereto).

³ *See* Wright & Miller, 6 Fed. Prac. & Proc. Civ. § 1489 (3d ed.); *cf. Freeman v. Cont'l Gin Co.*, 381 F.2d 459, 469 (5th Cir. 1967) (party seeking leave to amend waited eight months after having summary judgment entered against it before seeking to add new legal theory); *Bamm, Inc. v. GAF Corp.*, 651 F.2d 389, 391-92 (5th Cir. 1981) (distinguishing *Freeman*).

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able to legally engage in the medical use of marijuana. Under these circumstances, the Court finds (i) delay that is undue, not “mere delay,” and (ii) undue prejudice.

Based on the foregoing,

IT IS ORDERED denying Plaintiffs’ Motion for Leave to File a First Amended Complaint to Specifically Challenge One Additional ADHS Regulation as *Ultra Vires*.

Date: May 4, 2012

/ s / HONORABLE J. RICHARD GAMA

JUDICIAL OFFICER OF THE SUPERIOR COURT

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.