

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DUY T. MAI,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

NO. C17-561-RAJ

DEFENDANTS' RESPONSE TO  
PLAINTIFF'S MOTION TO  
AMEND

Defendants, by and through their attorneys, Annette L. Hayes, United States Attorney for the Western District of Washington, and Sarah K. Morehead, Assistant United States Attorney for the District, hereby file this opposition to plaintiff's motion to amend his complaint. The Court should deny plaintiff's motion to amend because the Court entered Judgment before plaintiff filed his motion to amend, and this case is closed. Plaintiff has not filed a motion for relief from the Judgment, and there is no basis to do so. Even if the Court were to consider the motion to amend, the motion must be denied because the proposed amendment would be futile, and plaintiff has engaged in undue delay.

On February 8, 2018, the Court entered an order granting defendants' motion to dismiss and entered Judgment on the same day. Dkt. # 12, 13. Plaintiff did not move for reconsideration of that

1 order, and the deadline to do so has passed. On February 12, 2018, plaintiff filed a motion to amend  
2 his complaint. Dkt. #14. Plaintiff seeks to add additional facts about his petition to King County  
3 Superior Court to restore his firearm rights, including incorporating the evidence he submitted in  
4 support of that petition. Dkt. #14-1 at p. 4.  
5

6 Pursuant to the Court's previously entered Judgment, this case is now closed. There does not  
7 appear to be any authority to allow the Court to grant a motion to amend a complaint in a closed  
8 case. Plaintiff has not filed a motion for relief from the Judgment, and there is no basis for doing so.  
9

10 Even if the Court were to consider the motion to amend in this closed case, it should be  
11 denied for at least two reasons. Although Federal Rule of Civil Procedure 15(a)(2) requires courts to  
12 "freely give leave when justice so requires," courts may deny leave to amend when there has been  
13 undue delay or the proposed amendment is futile, among other reasons. *See, e.g., Foman v. Davis*,  
14 371 U.S. 178, 182 (1962). A court should not permit a party to amend if the amendment would be  
15 subject to dismissal for failure to state a claim. *See, e.g., Saul v. United States*, 928 F.2d 829, 843  
16 (9th Cir. 1991) (citations omitted). In this case, the proposed amendment would be futile because  
17 the Court has already considered the proposed new facts and assumed them to be true. Order (Dkt.  
18 #12) at p. 2 (explaining that plaintiff supplied the King County Superior Court with "medical and  
19 psychological examinations and supportive declarations" and the court granted his petition).  
20 Because the Court presumed those facts to be true, there is no reason to believe that amending the  
21 complaint to add copies of the underlying declarations and medical evidence would change the  
22 result. *Id.* at p. 1 (explaining that plaintiff's allegations in the complaint were "assumed to be true  
23 for purposes of this motion to dismiss."). Furthermore, plaintiff's proposed new factual evidence  
24 does not undermine the Court's legal conclusions. *Id.* at p. 9-12.  
25  
26  
27  
28

1 Plaintiff has also engaged in undue delay, waiting until after the Court granted defendants'  
 2 motion to dismiss and entered Judgment before moving to amend. *Georgiou Studio, Inc. v.*  
 3 *Boulevard Invest., LLC*, 663 F. Supp. 2d 973, 978 (D. Nev. 2009) (denying motion to amend  
 4 because plaintiff's "delay in waiting until after the large majority of their claims were disposed of  
 5 via summary judgment, suggests rather a wait and see approach, rather than discovery of new  
 6 information."). "Late amendments to assert new theories are not reviewed favorably when the facts  
 7 and the theory have been known to the party seeking amendment since the inception of the cause of  
 8 action." *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994) (citation omitted). Similarly, there is  
 9 no excuse for plaintiff's undue delay in this case. He was aware of the facts he now seeks to add  
 10 since the inception of the case.  
 11

12 For all of the foregoing reasons, plaintiff's motion to amend must be denied.  
 13  
 14

15 DATED this 26th day of February, 2018.  
 16

17 Respectfully submitted,  
 18

19 ANNETTE L. HAYES  
 20 United States Attorney

21 /s/ Sarah K. Morehead  
 22 SARAH K. MOREHEAD, WSBA #29680  
 23 Assistant United States Attorney  
 24 United States Attorney's Office  
 25 700 Stewart Street, Suite 5220  
 26 Seattle, Washington 98101-1271  
 27 Phone: 206-553-7970  
 28 Email: sarah.morehead@usdoj.gov

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the plaintiff(s).

Vitaliy Kertchen  
KERTCHEN LAW PLLC  
711 Court A  
Suite 104  
Tacoma, WA 98402  
253-905-8415  
vitaliy@kertchenlaw.com

I hereby certify that I have served the foregoing document to the following non-CM/ECF participant(s)/CM/ECF participant(s), via USPS mail, postage pre-paid.

-0-

DATED this 26<sup>th</sup> day of February, 2018

/s/Julene Delo  
JULENE DELO  
Legal Assistant  
United States Attorney's Office  
700 Stewart Street, Suite 5220  
Seattle, Washington 98101-1271  
Telephone: 206-553-7970  
Fax: 206-553-4067  
Email: julene.delo@usdoj.gov