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

FAWZI KHALID ABDULLAH FAHAD AL ODAH)	
<i>et al,</i>)	
)	
Plaintiffs-Petitioners,)	
)	
v.)	No. 02 CV 0828 (CKK)
)	
UNITED STATES OF AMERICA <i>et al.</i>,)	
)	
)	
Defendants-Respondents.)	
)	

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Fawzi Khalid Abdullah Fahah Al Odah *et al.*, plaintiffs-petitioners (the “Kuwaiti Detainees”),¹ move under Fed.R.Civ.P. 15(a) and LCvR 7(i) for leave to file a second amended complaint, which is attached as Exhibit A.² In accordance with LCvR 7.1(m), counsel for the parties discussed this motion and counsel for defendants-respondents (the “government”) advised that the government will oppose it.

Fed. R. Civ. Proc. 15(a) provides that, after a party has amended its pleading once, it may amend its pleading again only by leave of court or by written consent of the adverse party. However, Fed.R.Civ.P. 15(a) stipulates that “leave shall be freely given when justice so

¹ Plaintiffs-petitioners include 11 Kuwaiti nationals who are detained at the Guantanamo Bay Naval Base, one Kuwaiti national who was detained at Guantanamo and released in January 2005 to Kuwait, and family members of the detainees. The movants in this motion are the 11 presently detained Kuwaitis.

² To the extent the Court believes or the government argues that consideration of this motion is precluded by the stay pending appeal granted by this Court on February 3, 2005, the Kuwaiti Detainees respectfully request that, the Court modify its stay to permit consideration and grant of this motion. *See Marsh v. Johnson*, 263 F.Supp.2d 49, 52 (D.D.C. 2003). The issues raised by this motion are independent of and unrelated to the issues on appeal.

requires.” This Court has emphasized that the courts “must heed Rule 15’s mandate that leave is to be ‘freely given when justice so requires.’” *Adair v. Johnson*, 216 F.R.D. 183, 186 (D.D.C. 2003) (citing Fed. R. Civ. P. 15(a)). *See also Foman v. Davis*, 371 U.S. 178, 182 (1962); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1083 (D.C. Cir. 1998)).

Here, justice requires that the Kuwaiti Detainees be permitted to file a second amended complaint. The Court anticipated that, following the Supreme Court’s decision in this case (*Rasul v. Bush*, 124 S. Ct. 2686 (2004)) on June 28, 2004, counsel would meet with the Kuwaiti Detainees and likely would need to file supplemental pleadings and amended petitions.³ Because of delays attributable largely to the government’s efforts to deny counsel the opportunity to meet with their clients in confidence, counsel and the Kuwaiti Detainees only recently met for the first time—almost three years after the first and amended complaints were filed. Consequently, counsel only recently learned that, among other things, the Kuwaiti Detainees are being subjected to inhumane and substandard living conditions at Guantanamo. Counsel now have the information they need to bring supplemental claims that challenge the conditions of the Kuwaiti Detainees’ confinement at Guantanamo. The filing of these supplemental claims will not prejudice the government, which has long been aware of the factual basis for them.

**THE COURT HAS WIDE DISCRETION TO GRANT THE KUWAITI
DETAINEES LEAVE TO FILE A SECOND AMENDED COMPLAINT**

It is firmly within the discretion of this Court to grant the Kuwaiti Detainees’ motion for leave to file a second amended complaint. Furthermore, this Court liberally construes Fed.R.Civ.P. 15 and freely grants a request to amend pleadings as long as there is no compelling reason mitigating against such a request. *See, e.g., Adair*, 216 F.R.D. at 186; *Miss. Ass. Of*

³ See Transcript of Telephone Conference Before Hon. Colleen Kollar-Kotelly, June 29, 2004, at 4:10-18; Transcript of Telephone Conference Before Hon. Colleen Kollar-Kotelly, July 2, 2004, at 17:12-20.

Cooperatives v. Farmers Home Adm., 139 F.R.D. 542, 543 (D.D.C. 1991). Indeed, the District of Columbia Circuit has held that it is an “abuse of discretion” for a trial court to deny leave to amend unless it finds a sufficiently compelling reason, such as “undue delay, bad faith or dilatory motive ... repeated failure to cure deficiencies by [previous] amendments ... [or] futility of amendment.” *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (quoting *Foman*, 371 U.S. at 182). As demonstrated below, the Kuwaiti Detainees’ motion is not brought as a result of undue delay, bad faith, or improper motive. Therefore, the Court should exercise its discretion to grant it.

A. There Has Been No Undue Delay on the Part of the Kuwaiti Detainees and the Government Will Not Be Prejudiced by the Court’s Grant.

The Kuwaiti Detainees are seeking leave to file a second amended complaint in a prompt manner for the primary purpose of adding claims regarding their inhumane living conditions at Guantanamo. As mentioned, counsel to the Kuwaiti Detainees have only recently learned, through visits with their clients in January and February 2005 at Guantanamo, that the Kuwaiti Detainees are being subjected to deplorable and inhumane conditions of confinement that violate the Fifth Amendment, common law, and the Geneva Conventions. At the time the original and first amended complaints were filed in the Spring of 2002, counsel were not permitted to visit or even speak with their clients and had no first-hand knowledge of the conditions of their confinement. Such visits were allowed only after the Supreme Court’s decision in *Rasul* and this Court’s orders of October 20, 2004, and November 8, 2004, governing counsel access to the detainees at Guantanamo. Counsel’s first visit to Guantanamo took place December 26-29, 2004.

Subsequently, counsel learned the details of the conditions of the Kuwaiti Detainees’ confinement during attorney-client visits at Guantanamo in January and February 2005. Until

then, the Kuwaiti Detainees had no ability to communicate those details to counsel.

Accordingly, there has been no undue delay by the Kuwaiti Detainees in requesting leave to further amend their complaint.

Moreover, the Court should not deny leave to amend based solely on time elapsed between the filing of the first amended complaint and the request for leave to file a second amended complaint. *Atchinson v. District of Columbia*, 73 F.3d 418, 426 (D.C. Cir. 1996) (citing *Foman*, 371 U.S. at 182). Rather, the Court should examine whether this passage of time will prejudice the government. *See Adair*, 216 F.R.D. at 186 (noting that prolonged nature of case does not affect whether plaintiff may amend complaint, but prejudice to opposing party may affect plaintiff's request). No such concern exists here.

The government will suffer no prejudice as a result of the Kuwaiti Detainees' current request to amend their complaint a second time. There is no evidence and the government cannot show that it is being "unfairly disadvantaged or deprived of the opportunity to present facts or evidence" that could have been offered had the Kuwaiti Detainees sought to amend their pleadings at an earlier time. *See Dooley v. United Techs. Corp.*, 152 F.R.D. 419, 425 (D.D.C. 1993) (quoting *Foremost-McKesson Inc. v. Islamic Rep. Of Iran*, 759 F. Supp. 855, 858 (D.D.C. 1991)). Furthermore, the Kuwaiti Detainees were unable to amend their complaint earlier to include claims about their inhumane living conditions because of the government's own long-standing refusal to allow counsel access to them.

As previously stated, the Court anticipated that the Kuwaiti Detainees would develop and supplement their claims and the grounds upon which they seek relief after meeting with their counsel.⁴ Thus, the government was on notice that, once counsel were granted access to the

⁴ *See supra*, n. 3.

Kuwaiti Detainees, the Kuwaiti Detainees likely would supplement their pleadings and further develop their claims. The government cannot now claim disadvantage if the Court grants the Kuwaiti Detainees' motion for leave to file a second amended complaint, particularly because the amendments bear direct relation to the original complaint. *See Nat'l Treasury Employees Union v. Helfer*, 53 F.3d 1289, 1295 (D.C. Cir. 1995) (noting that amendments may cause prejudice if they bear only a tangential relationship to complaint and original litigation).

Moreover, the government will have the opportunity to present evidence of its own relevant to the Kuwaiti Detainees' additional claims. Indeed, the litigation is still in its early stages; discovery and trial dates have not even been scheduled. *See Societe Liz, S.A. v. Charles of the Ritz Group, Ltd.*, 118 F.R.D. 2, 4 (D.D.C. 1991) (finding prejudice when motion to amend pleading was filed just before close of discovery and not long before trial began); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, Civ. A. No. 83-3347, 1987 WL 9232, at *2 (D.D.C. March 25, 1987) (finding prejudice on adverse party when proposed amended pleading would prolong discovery and previously announced deadlines). Accordingly, the government will suffer no prejudice if the Kuwaiti Detainees are granted leave to file a second amended complaint.

B. Further Amendments to the Kuwaiti Detainees' Complaint Are Not Futile.

The Kuwaiti Detainees' proposed amendments to their first amended complaint are not futile. An amended complaint is futile only if it "merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss." *Adair*, 216 F.R.D. at 186 (citing, *inter alia*, *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002)). The Kuwaiti Detainees seek to amend the complaint a second time to add wholly new claims, though such

claims are related to their initial claims in the case. The amendments present a coherent legal theory, and, as detailed in the Kuwaiti Detainees' Motion for Preliminary Injunction and Provisional Motion for Modification of Stay filed simultaneously with this motion, the Kuwaiti Detainees' claims challenging the conditions of their confinement likely will succeed on the merits. Accordingly, the "underlying facts [and] circumstances" relied upon by the Kuwaiti Detainees are the "proper subject of relief," and the Court should grant the request for leave to amend. *See Foman*, 381 U.S. at 182 (stating that if underlying facts are proper subject of relief, plaintiff "ought to be afforded an opportunity to test his claim on the merits.").

CONCLUSION

For these reasons the Court should grant the Kuwaiti Detainees leave to file the second amended complaint attached as Exhibit A.

Respectfully submitted,

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