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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No.: CV 99-10518-GHK(AJWx) Date: August 29, 2005

Title: Chang, et al. v. United States

DOCKET ENTRY

PRESENT: Hon. George H. King, United States District Judge

| | |
|---|---|
| Beatrice Herrera | None |
| Deputy Clerk | Court Reporter |
| ATTORNEYS PRESENT FOR PLAINTIFFS: | ATTORNEYS PRESENT FOR DEFENDANT: |
| None | None |



PROCEEDINGS: Plaintiffs' Renewed Motions to Amend Complaint, Consolidate Cases, and Certify a Class

This matter is before the Court on the above-entitled motions. After considering all the papers filed and oral argument, we rule as follows:

## I. Background

The parties are familiar with the facts in the current action. Consequently, we will not repeat any facts except as necessary.

## II. Discussion

### A. Motion to Amend

Plaintiffs move to amend their complaint to (1) redefine the class from "alien investors who are now subject to the denial of their permanent residency . . ." to "alien investors . . . who have received or will receive a denial of their permanent residency . . ."; and (2) clarify their estoppel claim. Renewed Mot. to Amend at 7:11-24.

For the reasons stated below, we **GRANT** the motion to amend.

#### 1. Legal Standard

Under Fed. R. Civ. P. 15(a),

> A party may amend the party's complaint once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading

127

> only by leave of court . . . ; and leave shall be freely given when justice so requires.

We should apply Rule 15's policy of favoring amendment with "extreme liberality." DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). "This liberality in granting leave to amend is not dependent on whether the amendment will add new causes of action or parties." Id. Rather, in determining whether to grant leave to amend, we consider four factors: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; and (4) futility of amendment. Id. "These factors are not equally important; the possibility of delay alone cannot justify denial of leave to amend." Genentech, Inc. v. Abbott Labs., 127 F.R.D. 529, 530 (N.D. Cal. 1989). The crucial factor is whether allowing amendment will result in prejudice to the opposing party. Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973); see also Keniston v. Roberts, 717 F.2d 1295, 1300 (9th Cir. 1983) ("[o]rdinarily, leave to amend should be freely given in the absence of prejudice to the opposing party").

Moreover, the nonmoving party bears the burden of demonstrating why leave to amend should not be granted. Genentech, Inc., 127 F.R.D. at 530-31. If the nonmoving party claims that the proposed claim is futile, we apply the same test as to legal sufficiency as on a Rule 12(b)(6) motion. Nissan Motor Co., Ltd. v. Nissan Computer Corp., 204 F.R.D. 460, 463 n.5 (C.D. Cal. 2001) (citing Rose v. Hartford Underwriters Ins. Co., 203 F.3d 417, 420 (6th Cir. 2000)).

**2. Motion to Amend to Redefine the Class**

Defendant has not met its burden of demonstrating why we should not allow plaintiffs to redefine the class to include those "alien investors . . . who have received or will receive a denial of their permanent residency . . . ." Defendant's opposition to plaintiffs' motion addresses only plaintiffs' proposed estoppel claim. As a result, defendant has made no showing of any of the factors which generally militate against granting leave to amend. Thus, we **GRANT** the motion to redefine the class to include those "alien investors . . . who have received or will receive a denial of their permanent residency . . . ."

**3. Motion to Amend to Clarify Estoppel Claim**

Plaintiffs move to amend their complaint to clarify their estoppel claim alleging that plaintiffs cannot comply with the EB-5 program requirements due to allegedly illegal actions by Defendant. Specifically, plaintiffs allege that:

> The [d]efendant should . . . be estopped from denying [p]laintiffs' I-829 applications . . . as the failure to comply with the investment and job preservation requirements is solely due to the [d]efendant's affirmative misrepresentations to [p]laintiffs that first induced

> [p]laintiffs to invest and thereafter determined the investment was illegal.

Proposed S.A.C. ¶ 137.



**a. Prejudice**

Defendant has not shown that it would be sufficiently prejudiced by the amendment. No trial date has been set and, to the extent that additional limited discovery is necessary, we are inclined to grant such discovery so as to minimize any potential prejudice. See Genentech, Inc., 127 F.R.D. at 531 (finding that defendant's assertions that amendments would require it to "depose numerous witnesses[, conduct] additional document searches and written discovery [and] that additional discovery will postpone the trial date [did] not constitute undue prejudice [because] [a]ccording to plaintiff, facts came to light only after the original complaint was filed and during the course of discovery").

**b. Bad Faith**

Defendant does not argue that plaintiffs' desire to amend is predicated on bad faith. Thus, this factor does not weigh in favor of denying leave to amend.

**c. Undue Delay**

Defendant alleges that allowing additional amendments would cause undue delay as it would necessitate extensive discovery. As discussed above, however, no trial has been set and a substantial amount of discovery touching upon plaintiffs' estoppel claim has occurred. Thus, the amendment will not unduly delay the litigation.

**d. Futility**

Defendant alleges that plaintiffs' proposed amendment is futile because it is barred by the law-of-the-case doctrine, is outside of the mandate of Chang v. United States, 327 F.3d 911, 930 (9th Cir. 2003), is unnecessary in light of defendant's proposed class definition, and seeks a remedy barred by INS v. Pangilinan, 486 U.S. 875, 885 (1988).

Defendant's arguments are unavailing. Plaintiffs' proposed estoppel claim is distinct from the estoppel claim before the court in Chang. In Chang, plaintiffs sought to estop defendant's from retroactively applying the Precedent Decisions.[1] Plaintiffs'

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[1] The Precedent Decisions include: In re Soffici, Int. Dec. 3359, 1998 WL 471519 (Exam. Comm. June 30, 1998); In re Hsiung, Int. (continued...)

proposed estoppel claim, however, seeks to estop defendant's from denying plaintiffs' I-829 applications on the grounds that plaintiffs failed to comply with the investment and job preservation requirements. Proposed S.A.C. ¶ 137. As such, defendant's law-of-the-case and mandate arguments are unavailing. See United States v. Hughes Aircraft Co., 243 F.3d 1181, 1186 (9th Cir. 2001) (recognizing that the law-of-the-case "doctrine does not apply to issues not addressed by the appellate court"); United States v. Washington, 172 F.3d 1116, 1118 (9th Cir. 1999) ("[M]andate 'is controlling as to all matters within its compass, but leaves the district court any issue not expressly or impliedly disposed of on appeal.'").

Defendant's proposed class definition also fails to render plaintiff's proposed estoppel claim futile as it is completely silent as to plaintiffs' claim that they are unable to comply with the investment and job preservation requirements due solely to defendant's alleged affirmative misconduct.

Additionally, Pangilinan is inapplicable. Assuming that plaintiffs succeed on their claim, we would not be conferring citizenship or permanent legal residency even if we were to estop defendant from denying plaintiffs' I-829 requirements based upon their inability to comply with the investment and job preservation requirements as an alleged result of defendant's misconduct. Before plaintiffs' I-829s could be approved, plaintiffs would still have to show that they complied with all requirements of the EB-5 program prior to the date that defendant's alleged affirmative misconduct caused the termination of their investments.

Moreover, Salgado-Diaz v. Ashcroft, 395 F.3d 1158 (9th Cir. 2005), suggests that estoppel under these circumstances may be permissible. In Salgado-Diaz, the plaintiff sought review of a Board of Immigration Appeals ("BIA") decision finding him removable, arguing that the government violated his due process rights by unlawfully arresting him even though he was in immigration proceedings at the time, involuntarily removing him pursuant to the unlawful arrest, and denying him a fair hearing before the BIA. Id. at 1159. The government argued that, even if the plaintiff's claims were true, the plaintiff's attempt to re-enter the U.S. with false documents after he was allegedly involuntarily removed was "an independent and adequate basis for ordering [the plaintiff] removable." Id. at 1165. The court rejected the government's independent and adequate basis argument, reasoning that if the plaintiff could show that his due process rights were violated, then the government would be estopped from basing removal on "post-expulsion events [that the defendant's] own misconduct set in

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[1](...continued)
Dec. 3360, 1998 WL 483978 (Exam. Comm. Jul. 13, 1998); In re Izumii, Int. Dec. 3361, 1998 WL 483977 (Exam. Comm. Jul. 31, 1998); In re Ho, Int. Dec. 3361, 1998 WL 483979 (Exam. Comm. Jul. 31, 1998).

motion." Id. at 1166. Similarly, plaintiffs argue that they are unable to comply with the investment and job preservation requirements solely because of defendant's alleged affirmative misconduct. In other words, just as in Salgado-Diaz, plaintiffs argue that defendant's alleged affirmative misconduct "set in motion a series of events that ultimately resulted in [plaintiffs] losing [their] opportunity to seek relief under then-existing immigration laws that likely would have entitled" them to an adjustment of their residency status. See id. Consequently, as recognized in Salgado-Diaz, "the doctrine of equitable estoppel precludes the INS from relying on the consequences of its own alleged affirmative misconduct to insulate that misconduct from review." See id. at 1165.

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Finally, for purposes of a motion to amend, plaintiffs have adequately stated a claim for equitable estoppel. Plaintiffs allege affirmative misconduct in that defendant repeatedly assured plaintiffs in meetings, memoranda, decisions, and continuous approvals of petitions that their investments complied with the EB-5 program even though it secretly concluded that the investments were unapprovable. See Proposed S.A.C. ¶¶ 12, 71, 79, 83, 101, 120-24, 134-35; see also Watkins v. U.S. Army, 875 F.2d 699, 707 (9th Cir. 1989); Sun Il Yoo v. INS, 534 F.2d 1325, 1329 (9th Cir. 1976); Lavin v. Marsh, 644 F.2d 1378, 1382-83 (9th Cir. 1981); Wagner v. Director, FEMA, 847 F.2d 515, 519 (9th Cir. 1988). They allege that the injustice to them outweighs any harm to the public interest because their inability to comply with the investment and job preservation requirements was caused solely by defendant's alleged affirmative misconduct, which jeopardizes the sacrifices they made to emigrate to the U.S. See id. ¶¶ 124, 133, 135, 137; see also Watkins, 875 F.2d at 708-09; Sun Il Yoo, 534 F.2d at 1329; Johnson v. Williford, 682 F.2d 868, 872-73 (9th Cir. 1982). They allege that defendant knew of the structure of the AIS partnerships. See id. ¶¶ 12, 71, 101, 120-22; see also Watkins, 875 F.2d at 710; Johnson, 682 F.2d at 872. They allege that defendant intended plaintiffs to rely on its representations that the AIS partnerships complied with the EB-5 program. See id. ¶¶ 125-28; see also Watkins, 875 F.2d at 710; Johnson, 682 F.2d at 872-73. They allege that they were ignorant of the fact that their petitions were unapprovable. See id. ¶¶ 120-24; see also Watkins, 875 F.2d at 710; Johnson, 682 F.2d at 872. Lastly, they allege that they relied on defendant's assurances. See id. ¶¶ 129, 132-33; see also Watkins, 875 F.2d at 710; Johnson, 682 F.2d at 872-73.

**e. Conclusion re Motion to Amend to Clarify Estoppel Claim**

In light of the foregoing, plaintiffs' motion to amend their complaint to clarify their estoppel claim is **GRANTED**.

**B. Motion to Consolidate**

Fed. R. Civ. P. Rule 42(a) provides, inter alia, that a court may order the consolidation of actions pending before it when such actions involve a common question of law or fact, or when consolidation may tend to avoid unnecessary costs or delay. A court has broad discretion in deciding whether or not to grant a motion for consolidation, although, typically, consolidation is favored. Perez-Funez v. Dist. Dir., INS, 611 F. Supp. 990, 994 (C.D. Cal. 1984) (citing A.J. Indus., Inc. v. United States Dist. Court, 503 F.2d 384, 389 (9th Cir. 1974); Ikerd v. Lapworth, 435 F.2d 197, 204 (7th Cir. 1970)).

We **GRANT** plaintiff's motion to consolidate this matter with Ahn v. United States, CV 01-7382-GHK(AJWx). Both actions involve common questions of law in that they challenge the retroactive application of the Precedent Decisions. Likewise, both actions involve common questions of fact in that all plaintiffs allege that their I-829 petitions will be denied under the Precedent Decisions, and that they have complied with the EB-5 program requirements as they stood prior to the publication of the Precedent Decisions.

Consolidation of the two actions would avoid unnecessary costs and delay. Consolidating the actions would permit the Court to lift the stay in Ahn and permit those plaintiffs to seek redress. Also, failure to consolidate the matters would result in duplicative effort and discovery. See Perez-Funez, 611 F. Supp. at 994.

Additionally, a preexisting class action does not prevent the future consolidation of one or more related cases for purposes of fostering a more efficient and just resolution of plaintiffs' claims. Moreover, consolidation with pending class actions is well recognized in the field of securities litigation, see, e.g., Bowman v. Legato Sys., Inc., 195 F.R.D. 655, 657 (N.D. Cal. 2000), and there are no reasons to suggest that the benefits of consolidation are not as applicable in the current context.

Accordingly, Ahn is hereby **CONSOLIDATED** with this matter. Ahn is therefore **DISMISSED** without prejudice. The allegations in the complaint and answers and defenses in the answer in Ahn are deemed incorporated into this matter. All further filings shall be made under this case and number.

**C. Motion to Certify Class**

The parties propose different definitions for the proposed class. Neither party, however, has presented a sufficient explanation in support of the respective proposals. Moreover, in light of the amendments, the proposed class definitions are inadequate. As such, although we are inclined to grant certification for a class consistent with this order, we decline to do so at this time. Instead, the parties are **ORDERED** to meet and confer in an attempt to reach an agreement as to a class definition consistent

with this order, and file such proposed class definition with the court by September 26, 2005. Should the parties fail to reach a consensus, the parties shall file a joint brief by September 26, 2005, that identifies: (i) plaintiffs' proposed class that they allege is consistent with this order, followed by defendant's specific objections and plaintiff's responses to such objections; and (ii) defendant's proposed class that it alleges is consistent with this order, followed by plaintiffs' specific objections and defendant's responses to such objections. Upon the filing of such agreed upon class definition or joint brief, we will determine whether class certification is appropriate and issue all appropriate orders.



III. Disposition

In light of the foregoing, plaintiffs' motion to amend complaint is **GRANTED**. Additionally, plaintiffs' motion for consolidation is **GRANTED**. At this time, however, we decline to rule on plaintiffs' motion for class certification. Upon our resolution of the certification issue as provided for herein, we will order plaintiff to file an amended complaint in conformity with this order and any order approving class certification.

**IT IS SO ORDERED.**

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