U.S. Department of Justice

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December 5, 2011

BY FACSIMILE (212) 805-0426
Hon. Laura Taylor Swain
United States District Judge
United States District Court
500 Pearl Street, Suite 755
New York, New York 10007

Re: *Den Hollander v. Members of the Board of Regents*, 10 Civ. 9277 (LTS) (HBP)

Dear Judge Swain:

I write on behalf of the United States Department of Education and the Secretary of Education (collectively, "the Federal Defendants") to oppose plaintiff Roy Den Hollander's motion to vacate the judgment and amend the complaint [Docket No. 34]. The Federal Defendants respectfully request that the Court accept this letter in lieu of a formal opposition to plaintiff's motion, and enter this letter on the docket.

This is plaintiff's now-third attempt to craft a complaint that survives the pleadings stage, and it is no more successful than his previous attempts. As the Court will recall, Plaintiff believes that federal (and state) funding provided for students at Columbia University violates the First Amendment's Establishment Clause because the university has a women's studies department, which teaches about feminism, and feminism — in plaintiff's singular view — is a religion. In Plaintiff's first action ("*Hollander I*"), the district court dismissed this action on the grounds that Plaintiff lacked standing to prosecute it, and because it was frivolous. *See Hollander v. Inst. for Research on Women & Gender.*, No. 08 Civ. 7286 (LAK) (KNF), 2009 WL 1025960 (S.D.N.Y. Apr. 15, 2009) (report and recommendation), *approved by* Order (LAK) (S.D.N.Y. Apr. 24, 2009) (unpublished).[1] The Second Circuit upheld the district court's decision on standing alone, and thus did not reach the frivolousness issue, though the Circuit indicated that it shared the district court's skepticism on the merits of Plaintiff's bizarre theory. *Hollander v. Inst. for Research on Women & Gender.*, 372 F. App'x 140, 142 (2d Cir. 2010).

[1] A copy of Judge Kaplan's unpublished order was previously provided to this Court in connection with the Government's briefing of its motion to dismiss. An additional copy can be provided to the Court upon request.

Plaintiff then filed the second, instant action ("*Hollander II*"), which added further allegations regarding his standing. This Court held, however, that the determination of his standing in the earlier case was *res judicata* and could not be relitigated upon new allegations in a second action. *See* [Docket No. 24] (report and recommendation), *approved by* 2011 WL 5222912 (S.D.N.Y. Oct. 31, 2011). Judgment was entered dismissing this second action on October 31, 2011. [Docket No. 30].

Plaintiff now seeks to vacate the judgment, pursuant to Federal Rules of Civil Procedure 59 and 60, so that he can have a third crack at this complaint, by adding two additional plaintiffs. This request should be rejected for several reasons. Plaintiff's request does not satisfy the strict requirements for reopening a judgment, which are based on the important interest in finality. Even if Plaintiff's request were timely, his proposed complaint cannot be accepted because his claims plainly would not survive a motion to dismiss, because the addition of new plaintiffs does nothing to affect Plaintiff's own standing to bring this action nor does it cure the frivolous nature of the allegations themselves.

As Plaintiff notes, "[a] party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to Rules 59(e) or 60(b)." *Williams v. Citigroup Inc.*, 659 F.3d 208, 213 (2d Cir. 2011) (internal quotation marks and brackets omitted). "[C]onsiderations of finality do not always foreclose the possibility of amendment, even when leave to replead is not sought until after the entry of judgment. . . . [I]n view of the provision in [Federal Rule of Civil Procedure] 15(a) that leave to amend [a complaint] shall be freely given when justice so requires, it might be appropriate in a proper case to take into account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment." *Id.* (citations and internal quotation marks omitted). Thus, a determination of whether to permit Plaintiff to vacate the judgment requires an examination of how the Court would consider a timely motion to amend his complaint. Here, such a motion, as discussed below, would be doomed.

As numerous courts have held, "Rule 15 does not permit a plaintiff [to] amend[] its complaint to substitute a new plaintiff in order to cure the lack of subject matter jurisdiction." *United States ex rel. Fed. Recovery Servs., Inc. v. Crescent City E.M.S., Inc.*, 72 F.3d 447, 453 (5th Cir. 1995); *accord Wright v. Dougherty County*, 358 F.3d 1352, 1356 (11th Cir. 2004) ("Where a plaintiff never had standing to assert a claim against the defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs, a new class, and a new cause of action." (internal quotation marks omitted)); *In re Enron Corp. Secs., Derivative & ERISA Litig.*, Nos. H-01-3624, H-04-4520, 2011 WL 5967239, 12 n.19 (S.D. Tex. Nov. 29, 2011) ("The general rule is that a plaintiff who lacks standing may not amend a complaint to substitute a new plaintiff to cure a lack of jurisdiction because a plaintiff may not create jurisdiction by amendment where none exists."); *Zangara v. Travelers Indem. Co. of Am.*, No. 1:05CV731, 2006 WL 825231, at *3 (N.D. Ohio Mar. 30, 2006) (citing *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir. 2002)) ("[Plaintiff's] lack of standing precludes him from amending the complaint to substitute new plaintiffs and join a new defendant. More precisely,

his lack of standing divests this Court of subject matter jurisdiction necessary to even consider such a motion."); *Lans v. Gateway 2000, Inc.*, 110 F. Supp. 2d 1, 10 (D.D.C. 2000) ("[W]hen a plaintiff never had standing to assert a claim against the defendant, plaintiff may not substitute a new plaintiff, a new defendant, or a new claim for the purpose of creating jurisdiction.").

And even if Plaintiff could somehow surmount this hurdle, his underlying claims would still fail because they are frivolous. "Amendment is futile when the proposed amendment is clearly frivolous, advances a claim legally insufficient on its face, or does not cure the deficiencies in the original complaint." *Cullen v. City of New York*, No. 07-CV-3644 (CBA), 2010 WL 6560742, at *14 (E.D.N.Y. July 13, 2010) (citing *Arnold v. KPMG LLP*, 334 F. App'x 349, 352 (2d Cir. 2009)). As Judge Kaplan observed in his order dismissing Plaintiff's first action, "plaintiffs' central claim is that feminism is a religion and that alleged federal and state approval of or aid to Columbia's Institute for Research on Women & Gender therefore constitute a violation of the Establishment Clause of the First Amendment. Feminism is no more a religion than physics, and at least the core of the complaint therefore is frivolous." The Second Circuit agreed, noting that it "share[d] . . . the district court's grave doubts" about the merits of Plaintiff's claim. *Hollander I*, 372 F. App'x at 142. Plaintiff's proposed new complaint makes no changes to the substance of his outlandish theory beyond the proposed addition of plaintiffs, and thus his motion can be denied on this ground as well.[2]

In sum, Plaintiff's motion to amend his complaint to add new plaintiffs ought to be denied. Should the Court deem that this opposition ought to be presented in formal motion papers, the Federal Defendants respectfully request the opportunity to do so. I thank the Court for its consideration of this matter.

Respectfully,

PREET BHARARA
United States Attorney

By: _____
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cc: **BY EMAIL-PDF**
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[2] To the extent the Court reaches this issue, the Federal Defendants adopt by reference the arguments they made in *Hollander I* explaining why Plaintiff's First Amendment arguments lack any merit whatsoever. The relevant briefing was provided to the Court along with the Federal Defenadants' motion to dismiss, and an additional copy can be provided to the Court upon request.

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