IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NEZ PERCE TRIBE, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 06cv02239-JR
	)	
	)	**Electronically Filed on**
DIRK KEMPTHORNE,	)	**December 1, 2008**
SECRETARY OF THE INTERIOR, *et al.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT TO ADD THE FOLLOWING PLAINTIFFS: BAD RIVER BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; BOIS FORTE BAND OF CHIPPEWA; CACHIL DEHE BAND OF WINTUN INDIANS OF COLUSA RANCHERIA; CONFEDERATED SALISH & KOOTENAI TRIBES; CONFEDERATED TRIBES OF SILETZ INDIANS; GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS; KENAITZE INDIAN TRIBE; LAC COURTE OREILLES BAND OF OJIBWE; LEECH LAKE BAND OF OJIBWE; MINNESOTA CHIPPEWA TRIBE; NOOKSACK INDIAN TRIBE; PRAIRIE ISLAND INDIAN COMMUNITY; PUEBLO OF ZIA; RINCON LUISENO BAND OF INDIANS; SAMISH INDIAN NATION; SAN LUIS REY INDIAN WATER AUTHORITY; SPIRIT LAKE DAKOTAH NATION; SPOKANE TRIBE OF INDIANS; SUMMIT LAKE PAIUTE TRIBE; TULALIP TRIBES; AND, UTE MOUNTAIN UTE TRIBE, AND FOR THE COURT TO CONTINUE TO DEFER ITS RULING ON CLASS CERTIFICATION UNTIL IT HAS DECIDED THE MOTION TO AMEND

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U.S. Department of the Interior, Major Management Challenges: Hearing Before the H. Comm. on Natural Resources, 110th Cong. 10 (2007), (statement of Robin M. Nazzaro, Director, Natural Resources and Environment, Government Accountability Office), available at http://www.gao.gov/new.items/d07502t.pdf. 3-4

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U.S. Department of the Interior, Bureau of Indian Affairs, Interim Improvement Plan for the BIA, Trust Funds Management Improvement Program, Special Report, (July 1991) 4

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Bureau of Indian Affairs, Tribal Trust Funds Reconciliation Project Summary of Findings (Feb. 1996) 5

U.S. Department of the Interior, Office of the Inspector General, Independent Auditors Report on the Financial Statements for Fiscal Years 1998 and 1997 for the Office of the Special Trustee for American Indians, Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management, Rep. No. 00-I-434, (May 2000) 4

U.S. Department of the Interior, Office of the Inspector General, Statement of Assets and Trust Fund Balances at September 30, 1995, of the Trust Funds Managed by the Office of Trust Funds Management, Bureau of Indian Affairs (BIA), Audit Rep. No. 97-I-196 (Dec. 1996) 3

U.S. Government Accounting Office, Testimony before the U.S. Senate Select Committee on Indian Affairs, Financial Management, Status of BIA's efforts to Resolve Long-Standing Trust Fund Management Programs, GAO/T - AFMD-92-16, (Aug. 12, 1992) 4

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INTRODUCTION

Plaintiffs, the Nez Perce Tribe; the Mescalero Apache Tribe; the Tule River Indian Tribe; the Hualapai Tribe; the Yakama Nation; the Klamath Tribes; the Yurok Tribe; the Cheyenne-Arapaho Tribe; the Pawnee Nation of Oklahoma; the Sac and Fox Nation; the Santee Sioux Tribe of Nebraska; and, the Tlingit and Haida Tribes of Alaska, have moved this Court pursuant to Fed. R. Civ. P. 15(a) for an Order that is entered before the Court rules on class certification and that grants leave to amend the Complaint in this action to add the following tribes as plaintiffs: 1) Bad River Band of Lake Superior Chippewa Indians; 2) Bois Forte Band of Chippewa; 3) Cachil DeHe Band of Wintun Indians of Colusa Rancheria; 4) Confederated Salish & Kootenai Tribes; 5) Confederated Tribes of Siletz Indians; 6) Grand Traverse Band of Ottawa and Chippewa Indians; 7) Kenaitze Indian Tribe; 8) Lac Courte Oreilles Band of Ojibwe; 9) Leech Lake Band of Ojibwe; 10) Minnesota Chippewa Tribe; 11) Nooksack Indian Tribe; 12) Prairie Island Indian Community; 13) Pueblo of Zia; 14) Rincon Luiseno Band of Indians; 15) Samish Indian Nation; 16) San Luis Rey Indian Water Authority; 17) Spirit Lake Dakotah Nation; 18) Spokane Tribe of Indians; 19) Summit Lake Paiute Tribe; 20) Tulalip Tribes; and, 21) Ute Mountain Ute Tribe.

Plaintiffs' Motion for Leave to Amend the Complaint and for the Court to continue to defer its ruling on class certification until it has decided the Motion to Amend stems from several events. Plaintiffs filed this action as a class action and duly moved for class certification. At oral argument on class certification, without ruling on class certification, the Court suggested that permissive joinder was a more appropriate procedure for addressing the issue of who are the proper plaintiffs in this case.

Plaintiffs quickly moved for leave to send court-approved Notice to members of the putative

class, and to allow the members a reasonable opportunity to join voluntarily as additional plaintiffs before the Court ruled on class certification. The parties stipulated to a joint proposed Notice, which the Court approved on October 15, 2008. On October 17, 2008, Plaintiffs' counsel sent the Notice to 250 members of the putative class by United States Postal Service certified mail, return receipt requested.

Twenty-one members of the putative class have responded that they would like to join this action as additional plaintiffs. Plaintiffs' Motion to Amend under Rule 15(a) would add these 21 plaintiffs to the original 12 plaintiffs. With their Motion, Plaintiffs submit a proposed Second Amended Complaint that makes no changes other than to add the additional plaintiffs and to delete the class certification allegations. The class certification allegations are deleted solely on the assumption that the Court is going to deny class certification. In the event that class certification is granted, Plaintiffs assume that this Court will find the Motion to Amend to be moot, and that the First Amended Complaint (Dkt. # 27) will continue as the governing pleading.

Additionally, since under LCvR 15.1, proposed amended pleadings such as Plaintiffs' Second Amended Complaint are not deemed to be filed unless and until the entry of an order granting the motion to amend, Plaintiffs respectfully request that this Court continue its deferral of a ruling on class certification until it has ruled on the Motion to Amend. Otherwise the additional plaintiffs may endure significant undue hardship that would nullify the considerable efforts and events that have occurred leading up to the Motion.

STATEMENT OF THE CASE

Nature of this Action

This action seeks declaratory and other equitable relief with respect to accounts and funds that are held in trust for Plaintiffs by Defendants. Plaintiffs seek: 1) a declaration that Defendants have a legal fiduciary duty to provide Plaintiffs with full and complete accountings of their trust fund accounts; 2) a declaration that Defendants never have provided to Plaintiffs such accountings, and therefore that at least with respect to this fiduciary duty Defendants have been and continue to be in breach of trust, negligent, engaged in wrongful conduct, or in violation of other laws; 3) a declaration of the legal standards governing such accountings or accounting alternatives; 4) a mandatory injunction compelling Defendants to provide such accountings or alternatives; and, 5) a mandatory injunction compelling Defendants, based on the accountings or accounting alternatives, to correct Plaintiffs' trust fund account balances if there are errors. *See* First Am. Compl. at PRAYER FOR RELIEF (Dkt. # 27).

Brief History of Plaintiffs' Trust Fund Accounts

Since the early 1800s, pursuant to policy and legislation, the United States has self-assumed the trusteeship of the trust fund accounts of Indian tribes. *See* U.S. Department of the Interior, Office of the Inspector General (OIG), Statement of Assets and Trust Fund Balances at September 30, 1995, of the Trust Funds Managed by the Office of Trust Funds Management, Bureau of Indian Affairs (BIA), Audit Rep. No. 97-I-196, at 1-2 (Dec. 1996). The government presently purports to hold about $2.9 billion in about 1,450 trust fund accounts for over 250 tribes. *See* U.S. Department of the Interior, Major Management Challenges: Hearing Before the H. Comm. on Natural Resources,

110th Cong. 10 (2007), (statement of Robin M. Nazzaro, Director, Natural Resources and Environment, Government Accountability Office (GAO)), available at http://www.gao.gov/new.items/d07502t.pdf.

Tribal trust fund accounts generally include monetary payments required by treaty or in satisfaction of judgments against the United States (judgment funds), and income or proceeds earned by tribes from land and natural resources that the government holds in trust for tribes (proceeds of labor accounts). *See* U.S. Department of the Interior, BIA, Interim Improvement Plan for the BIA, Trust Funds Management Improvement Program, Special Report, at 8 (July 1991); U.S. Department of the Interior, OIG, Independent Auditors Report on the Financial Statements for Fiscal Years 1998 and 1997 for the Office of the Special Trustee for American Indians, Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management, Rep. No. 00-I-434, at 4-5 (May 2000). Tribal trust fund accounts also include the income earned on interest earnings and investments of the funds themselves.

Defendants' Well-Documented Mismanagement of Tribal Trust Funds

"Over the years, countless audit reports and internal studies have detailed a litany of problems in BIA's control and oversight of [Indian trust fund] accounts." GAO, Testimony before the U.S. Senate Select Committee on Indian Affairs, Financial Management, Status of BIA's efforts to Resolve Long-Standing Trust Fund Management Programs, GAO/T - AFMD-92-16, at 1 (Aug. 12, 1992). This Court has noted that "reports of Interior's defective accounting procedures [for Indian trust funds] date back to at least 1915." *Cobell v. Norton,* 283 F. Supp. 2d 66, 226 (D.D.C. 2003). Beginning in 1987, in recognition of Defendants failure to perform ever even the most basic

fiduciary obligation of providing full and complete, historic to present accountings to its Indian beneficiaries, Congress codified this inherent "full and complete accounting" mandate. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987); 25 U.S.C. §§ 4044 and 4011(c).

In 1991 Defendants embarked on a woefully inadequate effort to meet this mandate by contracting with the accounting firm of Arthur Andersen (AA). BIA Contract No. CMK00129391 (Reconciliation of the BIA's Trust Funds, Arthur Andersen & Co., Contractor) (May 23, 1991). AA was unable to perform full and complete, historic to present accountings for tribal trust funds. It did, however, prepare "Agreed Upon Procedures and Findings" reports that the BIA provided to 379 tribes in 1996-97. *See* BIA Tribal Trust Funds Reconciliation Project Summary of Findings (Feb. 1996). The AA reports covered only a twenty year time period, July 1972 - September 1992, and collected some data about some transactions in the accounts of some tribes for this limited time period.

Congressional Deferral of Commencement of Tribal Trust Fund Claims

In recognition of Defendants' failure to provide full and complete tribal trust fund accountings, Congress has deferred the commencement of tribal trust fund claims by two separate series of legislation. First, since 1990 and to the present (eighteen successive years), Congress has conditioned the accrual of tribal trust fund claims upon the provision of the requisite accounting. *See, e.g.,* Pub. L. No. 101-512, 104 Stat. 1915 (1990); Pub. L. No. 110-161, 121 Stat. 1844 (2007) (all providing to the effect that, "notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected tribe . . . has been furnished with an accounting of such funds from

which the beneficiary can determine whether there has been a loss").

Second, in the wake of the AA reports, Congress has spoken additionally and expressly. *See* Pub. L. No. 107-153, 116 Stat. 79 (2002) ("To Encourage the Negotiated Settlement of Tribal Claims") (providing, *inter alia,* that, "[n]otwithstanding any other provision of law, for purposes of determining the date on which an Indian tribe received a reconciliation report for purposes of applying a statute of limitations, any such report provided to or received by an Indian tribe in response to section 304 of the American Indian Trust Fund Management Report Act of 1994 (25 U.S.C. 4044) shall be deemed to have been received by the Indian tribe on December 31, 1999."). In 2005, this legislation was amended to provide that the reports shall be deemed to have been received on December 31, 2000. Pub. L. No. 109-158, 119 Stat. 2954 (2005). The legislative history states that its purpose "is to address the possibility that the statute of limitations is running or has run on legal claims that Indian tribal governments may assert against the United States related to the management of tribal funds that are held in trust by the United States, as a result of reconciliation reports provided to the tribes by the Department of the Interior in response to Section 304 of the American Indian Trust Fund Management Reform Act of 1994 . . . ." S. Rep. No. 107-138, at 1 (2002); *accord* S. Rep. No. 109-201, at 1 (2005).

Procedural History of this Action

The general statute of limitations for claims against the government provides in relevant part that civil actions against the government shall be barred unless filed within six years after the right of action first accrues. 28 U.S.C. § 2401(a). In light of the 2005 extension legislation, providing that the AA reports are deemed to have been received on December 31, 2000, this action was filed on

December 28, 2006 as a protective measure, *inter alia,* with respect to the claim that the AA reports are not the full and complete accountings to which tribal trust fund beneficiaries are entitled.[1]

This action was filed by eleven named plaintiffs and it was filed as a class action on behalf of all tribes that did not have their own separate actions for full and complete accountings of their trust funds. Compl. (Dkt. #1). In January 2007, Plaintiffs received from Defendants in response to a Freedom of Information Act (FOIA) request, a letter from Sue Ellen Sloca, FOIA Officer, Office of the Secretary, U.S. Department of the Interior (Jan. 16, 2007). Attached to this letter was an "Account Holders Distribution List" with the names of 311 American Indian / Alaska Native tribal account holders. As Ms. Sloca's letter stated, this list is "[t]he names of Indian tribes with tribal trust fund accounts at the Department of the Interior who received "Arthur Andersen" reconciliation reports in 1996 and 1997."

In April 2007, Plaintiffs filed a First Amended Complaint adding a twelfth named plaintiff tribe. (Dkt. # 27). On May 11, 2007, Defendants filed their Answer to the First Amended Complaint. (Dkt. #28). In August 2007, Defendants moved to remand this and all other tribal trust claims actions before this Court. (Dkt. #37). All tribes opposed the remand motion, which was denied in all cases on December 19, 2007. (Dkt. #43).

In June 2008, Plaintiffs moved for class action certification. (Dkt. #53). In general, Plaintiffs sought certification of a plaintiff class consisting of tribal trust fund account holders who received or were eligible to receive AA reports from Defendants; have not received full and complete

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[1] Plaintiffs' position is that this action was filed timely and that none of the claims raised are time-barred by any applicable statute of limitations. Assuming *arguendo,* however, that there are issues about timeliness, Plaintiffs expressly do not concede or waive in or by this Motion and Memorandum or otherwise any arguments or defenses that they may have regarding such issues.

accountings of their trust funds; and, did not have their own actions for full and complete accountings pending as of December 31, 2006.[2] Due to the exclusively declaratory and injunctive relief requested, certification was sought primarily under Fed. R. Civ. P. 23(b)(2), and due to the sovereignty of tribes, discretionary notice and opt-out rights for the class were sought under Fed. R. Civ. P. 23(d). Plaintiffs' best estimate of the number of potential class members, including themselves, was 260. *See* Pls.' Mem. in Supp. of their Mot. for Class Action Certification, at 32 (Doc. #57).

Oral argument on Plaintiffs' class certification motion was held on July 24, 2008 (Dkt. #69). At the conclusion of oral argument, the Court stated:

> On the class certification motion, I'm going to – I'm not going to deny it but I'm not going to grant it at this time. I am very interested in, and frankly troubled by, the sovereignty issue, which is a very precise and delicate issue. . . .
>
> And I think the sovereign nation issue, as technical as it is – and it is quite technical – may be dispositve. But even if it were not, I have yet to sort through the question of where you go with a class certification motion if you can't get much past the question of whether the government has provided an adequate accounting when it has issued these TRP reports. I mean, once you get past that, you are into individual tribe-by-tribe accounting, and I'm not sure that a class action helps that problem at all, and I think it may exacerbate it.
>
> And so I'm not granting it. I suppose for docket clarity I should deny it, but if I denied it, it would be without prejudice, because I think I can see a situation or two in which class certification might make some sense.
>
> But I really would suggest to the Native American Rights Fund that the much simpler way of resolving this matter is to get in touch with those tribes that need representation and say, we'll take you on, we'll do it. Because that's what they're offering to do with a class certification motion anyway.

[2] As stated in their Memorandum in Support of their Motion for Class Action Certification, at 31 (Dkt. #57), to the best of Plaintiffs' knowledge, at the time that they moved for class certification, 46 tribes had their own pending actions in federal district court for full and complete accountings.

Tr. of Mots. Hr'g, at 103-104 (July 24, 2008) (Dkt. #72); *see also* Minute Order (July 25, 2008) ("Motion to certify class . . . submitted and taken under advisement.").

Accordingly, on August 8, 2008, Plaintiffs moved for leave for Plaintiffs' counsel, the Native American Rights Fund (NARF), to send court-approved Notice to members of the putative class of plaintiffs and for those members to have a reasonable opportunity – Plaintiffs suggested sixty (60) days -- to permissively join this action before the Court rules on Plaintiffs' pending motion for class action certification. (Dkt. #73).

On September 9, 2008, the parties filed a Joint Stipulation as to Proposed Notice to the Putative Class along with a Proposed Notice for the Court's approval. (Dkt. #76). As stated in the Joint Stipulation, while the parties were able to agree on the form and content of the Proposed Notice, they were unable to agree on the related issue of the impact, if any, of the Notice on the timing of the Court's ruling on class certification. On September 16, 2008, Defendants filed their Response to Plaintiffs' Motion (Dkt. #78), opposing Plaintiffs' request that members of the putative class have a reasonable opportunity after Notice is sent and before a ruling on class certification to permissively join this action as plaintiffs. On September 26, 2008, Plaintiffs replied in support of their Motion. (Dkt. #80).

On October 15, 2008, this Court granted Plaintiffs' Motion to send court-approved Notice to members of the putative class, and approved the Notice (Dkt. #81). In its Order granting Plaintiffs' Motion, the Court stated that it expected "to rule on class certification on December 1, 2008, and that the approved notice reflects this." *Id.*

On October 17, 2008, NARF sent out the court-approved Notice by U.S. Postal Service certified mail, return receipt requested, to 250 tribal account holders based on the Account Holders

Distribution List provided by Defendants. To date twenty-one of the tribal account holders to whom Notice was sent have confirmed to NARF that they wish to join this action as additional plaintiffs represented by NARF.[3] Plaintiffs have so moved to amend their complaint to add these plaintiffs, and, in an effort to comply fully with the Court's Local Rules and minimize or eliminate any undue statute of limitations issues for the additional plaintiffs, have respectfully requested that this Court continue its deferral of any ruling on class certification until it has ruled on the Motion to Amend. In support of their Motion to Amend, Plaintiffs state the following points of law and authority.

SUMMARY OF ARGUMENT

Plaintiffs' Motion to Amend under Rule 15(a) is governed by the well-established presumption in favor of granting such amendments. Defendants have the burden of defeating this presumption by showing undue delay or undue prejudice; a showing they cannot make here. Moreover, the significant potential harm to the additional plaintiffs if leave to amend is denied – in terms of the statute of limitations issue – must be considered, and such potential harm further supports granting the amendment.

Additionally, in light of LCvR 15.1's express provision that motions to amend pleadings are not deemed filed until the ***"date on which the order granting the motion is entered,"*** to best prevent any undue statue of limitations issues for the additional plaintiffs, Plaintiffs respectfully urge this Court to continue deferring its ruling on their pending motion for class certification until the Court has ruled on their Motion to Amend the Complaint to add additional plaintiffs.

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[3] Another tribe has moved to intervene in ths action represented by its own counsel. *See* Mot. to Intervene of the Caddo Nation of Oklahoma (filed Nov. 26, 2008) (Dkt. #82).

ARGUMENT

I. PLAINTIFFS' MOTION TO AMEND THE COMPLAINT SHOULD BE GRANTED

A. Additional Plaintiffs May Be Added By Amending The Complaint Under Rule 15(a)

Fed. R. Civ. P. 15(a) allows parties to amend their pleadings to add parties. *See Triad at Jeffersonville I, LLC v. Leavitt,* 563 F. Supp. 2d 1, 11 (D.D.C. 2008) (citation omitted). "Generally, an amendment adding parties is permissible under Rule 15, and a class suit may be converted by amendment into a suit by plaintiffs individually." *Jackson v. Brotherhood of Ry. Carmen,* 1977 WL 26, at *3 (S.D. Ga. Oct. 29, 1977), *aff'd ,* 678 F.2d 992 (11th Cir. 1982) (where court never certified class, and proposed plaintiffs were members of class originally sought to be certified, court allows plaintiffs to amend complaint under Rule 15 to add additional plaintiffs); *see also Simon v. City of Clute,* 825 F.2d 940, 941 (5th Cir. 1987) (where court stated it would not certify a class it nevertheless directed plaintiffs to supplement their complaint by adding additional plaintiffs).

Adding plaintiffs by amending complaints under Rule 15(a) eliminates the need for the plaintiffs or potential plaintiffs to move for permissive joinder under Fed. R. Civ. P. 20, 21. *See In re Sunrise Senior Living, Inc.*, 550 F. Supp. 2d 1, 6 (D.D.C. 2008). Indeed, once a responsive pleading has been served, as is the case here, the standards for adding parties are the same regardless of whether the motion is made under Rules 20 and 21 or Rule 15(a). *Amore ex rel. Estate of Amore v. Accor North America, Inc.,* 529 F. Supp. 2d 85, 91 n.2 (D.D.C. 2008).[4]

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[4] In any event, the requirements for permissive joinder under Rules 20 and 21 are met here. The claims of the additional plaintiffs arise from the same transactions and occurrences as those of the original plaintiffs, and there are common questions of law and fact to all plaintiffs. *See Montgomery v. STG Int'l, Inc.*, 532 F. Supp. 2d 29, 35 (D.D.C. 2008).

B. Leave To Amend Under Rule 15(a) Is Granted Presumptively

Under Rule 15(a), since Plaintiffs already have amended their complaint once as a matter of course, and since the responsive pleading has been filed, they now may amend only "with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2).[5] With respect to leave, Rule 15(a)(2) expressly and generously states that "[t]he court should freely give leave when justice so requires." *Dove v. Washington Metro. Area Transit Auth.,* 221 F.R.D. 246, 247 (D.D.C. 2004), *citing* Rule 15(a). Granting leave to amend is committed to this Court's sound discretion. *Firestone v. Firestone,* 76 F.3d 1205, 1208 (D.C. Cir. 1996). While amendments are considered on a case-by-case basis, *Harris v. Sec'y, U.S. Dep't of Veterans Affairs,* 126 F.3d 339, 343 (D.C. Cir. 1997), requests to amend generally are looked upon favorably. 6 Charles A. Wright, *et al., Federal Practice and Procedure* § 1484 (2008); *see also Davis v. Liberty Mut. Ins. Co.,* 871 F.2d 1134, 1136-37 (D.C. Cir. 1989) ("It is common ground that Rule 15 embodies a generally favorable policy toward amendments.").

"If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis,* 371 U.S. 178, 182 (1962) (construing Rule 15(a)). This decades-old construction of Rule 15(a)'s permissive mandate is well-established in innumerable jurisdictions including this one. "The presumption runs in the plaintiff's favor that he may amend his complaint . . . ." *Steinbuch v. Cutler,* 463 F. Supp. 2d 1, 3 (D.D.C. 2006). Accordingly, although the court has considerable discretion to

[5] As stated in Plaintiffs' Motion to Amend, in accordance with LCvR 7(m), counsel for Plaintiffs discussed the proposed Motion with counsel for Defendants in a good faith effort to determine whether there was any opposition to the Motion and on what grounds. Counsel for Defendants responded that they were unable to take a position on the proposed Motion before seeing the Motion.

grant or deny leave to amend, "[i]t is an abuse of discretion . . . to deny leave to amend without sufficient reason such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the amendment, futility of amendment, etc." *American Soc. for the Prevention of Cruelty to Animals. v. Ringling Bros. and Barnum & Bailey Circus,* 244 F.R.D. 49, 50 (D.D.C. 2007) (quoting *Foman v. Davis,* 371 U.S. at 182); *accord Firestone v. Firestone,* 76 F.3d at 1208. "If none of these factors is present, leave to amend 'should, as the rules require, be freely given.'" *Darbeau v. Progressive Tech. Fed. Sys.,* 2007 WL 744726, at * 1 (D.D.C. Mar. 7, 2007) (citation omitted). The non-moving party bears the burden of persuading the court that one of these factors is present. *Lover v. District of Columbia,* 248 F.R.D. 319, 322 (D.D.C. 2008).

C. Defendants Here Cannot Meet Their Burden Of Defeating The Presumption In Favor Of Amending By Showing Any Undue Delay Or Undue Prejudice

1. There is No Undue Delay

"Rule 15(a) does not prescribe any time limit within which a party may apply to the court for leave to amend." 6 Charles A. Wright, *et al., Federal Practice and Procedure* § 1488; *accord Triad at Jeffersonville I, LLC v. Leavitt*, 563 F. Supp. 2d at 11. "Courts grant leave to amend under Rule 15(a) at various stages of the litigation: following discovery; after a pretrial conference; at a hearing on a motion to dismiss or for summary judgment; after a motion to dismiss has been granted but before the order of dismissal has been entered; when the case is on the trial calendar and has been set for a hearing by the district court; at the beginning, during, and at the close of trial; after judgment has been entered; and even on remand following an appeal." 6 Charles A. Wright, *et al., Federal Practice and Procedure* § 1488 (footnotes omitted). "Nonetheless, in keeping with the purpose of

Rule 15(a), which is to facilitate a determination of the action on the merits, a motion to amend should be made as soon as the necessity for altering the pleading becomes apparent." *Id.* (footnote omitted).

Leave to amend here has been sought by Plaintiffs with all due timeliness. Following the oral argument on class certification, Plaintiffs moved for leave to send Notice to the putative class within just fifteen days. Within thirty days of that motion, the parties stipulated to a Notice. This Court approved the Notice on October 15, 2008, and Plaintiffs' counsel sent the Notice two days later. The Motion to Amend, which takes into account the responses to the Notice, is made within forty-five days of the Court's approval of the Notice. There simply has been no delay, let alone undue, prejudicial delay. *See I.A.M. Nat'l Pension Fund v. TMR Realty Co.*, 2006 WL 544012, at *4 (D.D.C. Mar. 6, 2006) (no undue delay where plaintiffs acted promptly in bringing motion to amend).

Moreover, the proceedings in this action are in a very early stage. There have been no rulings on the merits of any claims or defenses. The most significant decision to date has been the denial of Defendants' Motion to Remand. Class certification and dismissal motions have been made and are pending. But "Rule 26(a) disclosures have not yet been provided, and no discovery has been taken," let alone scheduled. *Clark v. Feder Semo & Bard,* 560 F. Supp. 2d 1, 4 (D.D.C. 2008). Defendants thus procedurally are in precisely the same position with respect to the claims of the original and the added plaintiffs as they are with just the original plaintiffs' claims. In such instances, adding parties is entirely appropriate. *See Wilson v. ABN AMRO Mortgage Group*, 2005 WL 3508658, at *2 (D.D.C. Dec. 21, 2005) (where discovery is on-going and dispositive motions have not been made, "whatever additional time might be required to accommodate the new claims

and parties is unlikely to substantially hold up the case."); *see also Oneida Indian Nation v. County of Oneida*, 199 F.R.D. 61, 73-77 (N.D.N.Y. 2000) (in Indian lands claims action, refusing to deny on grounds of delay tribes' and federal government's requests to amend complaints to add a class of 20,000 individual landowners as defendants made over twenty-five years after case was filed, in part because the case was still in "very early stages" as there had been no discovery and no real motion practice yet).

2. There is No Undue Prejudice

"The test for allowing amendment is not whether Defendants will be at all disadvantaged, but whether they would be 'unfairly disadvantaged . . . .'" *Hartford Ins. Co. v. Socialist People's Libyan Arab Jamahiriya,* 422 F. Supp. 2d 203, 206 (D.D.C. 2006) (citation omitted). In other words, denying leave to amend requires not just prejudice but "undue prejudice." *Dove,* 221 F.R.D. at 248. Typical examples of undue prejudice are substantially changing or expanding the causes of action, claims, or theory of a case, or otherwise causing significant additional delay, expenses, or other burdens. 6 Charles A. Wright, *et al., Federal Practice and Procedure* § 1487 (footnotes omitted); *accord American Soc. For the Prevention of Cruelty to Animals*, 244 F.R.D. at 51.

Several factors here obviate a finding of substantial change or expansion. The proposed Amended Complaint adds only plaintiffs (and deletes the class certification allegations); otherwise it is identical to the original and first amended complaint. *See Fleck v. Cablevision VII, Inc.* 799 F.Supp. 187, 191 (D.D.C. 1992) ("prejudice to the other party is less likely to result from the addition of a plaintiff than from an amendment changing or adding defendants or claims."); *see also Clark v. Feder Semo & Bard*, 560 F. Supp. 2d at 4; *Peterson ex rel. Estate of Knipple v. Islamic Republic of Iran*, 2007 WL 950080, at *1 (D.D.C. Mar. 28, 2007). The additional plaintiffs covered

by this amendment will be represented by the same counsel as the original plaintiffs. *See German v. Federal Home Loan Mortgage Corp.*, 896 F.Supp. 1385, 1392 (S.D.N.Y. 1995) (allowing intervention of new named plaintiffs in class action where litigation was still in its early stages, new plaintiffs' potential claims had questions of law and fact in common with existing plaintiffs, and new plaintiffs would be represented by same counsel as existing plaintiffs). The additional plaintiffs agree to be bound by all proceedings in this action to date. *See Cabazon Band of Mission Indians v. National Indian Gaming Comm'n,* 827 F.Supp. 26, 29 n.3 (D.D.C. 1993) (where eighth tribe joined original seven tribes in on-going proceedings, it agreed to be bound by all decisions of the court to date).

Indeed, not only are Plaintiffs not in any way expanding the scope of their original complaint, arguably they are narrowing it. This action was filed by 12 tribes as a class action on behalf of over 250 additional tribes, but only 21 now seek to be added as additional plaintiffs. Defendants cannot reasonably claim that their burden of defending against 33 tribes is greater than defending against over 260 tribes. Moreover, Defendants have acknowledged that the additional plaintiffs could have filed separate actions against them, or moved "to join in other tribes' lawsuits . . . ." Defs' Opp'n to Pls' Mot. for Class Certification, at 20-21 (Dkt. #64); *see Hartford Ins. Co.*, 422 F. Supp. 2d at 206 (finding no undue prejudice by amendment to add new plaintiffs where those plaintiffs could have filed separate actions against Defendants in their own names).

Significantly, the filing of the complaint as a class action, as well as the pending motion for class certification and the oral argument on that motion, have given Defendants ample notice of the claims against them, and that those claims likely would be addressed with respect to plaintiffs in addition to the original twelve. *See Fleck,* 799 F.Supp. at 192 ("the original complaint was instituted

as a purported class action . . . [thereby giving defendants] notice of the number and generic identities of the potential plaintiffs."); *accord Djourabchi v. Self*, 240 F.R.D. 5, 13 (D.D.C. 2006); *In re Vitamins Antitrust Litigation*, 217 F.R.D. 34, 37 (D.D.C. 2003) (no prejudice where defendants were on notice of claims against it by similarly situated plaintiffs based on clearly common issues of fact); *see also Flaherty v. Gaimbra,* 2003 WL 22087617, at *1 (W.D.N.Y. Aug. 19, 2003) (even though discovery had begun, no prejudice in permitting amendment to add 99 plaintiffs in action challenging employer's salary freeze on equal protection grounds rather than having case proceed as a class action); *Voilas v. General Motors Corp*., 173 F.R.D. 389, 398 (D.N.J. 1997) (no prejudice in permitting amendment in two-year old action to add 176 new plaintiffs to original 6 plaintiffs in action alleging that fraudulent misrepresentations by employer's officials induced employees to accept early retirement package, where employer was aware from inception of case that plaintiffs were contemplating joining additional plaintiffs).

Nor, given the stage of the proceedings in this action, is there any other unfairness to or undue burden on Defendants. "Defendants will have ample opportunity to litigate any issues arising from these amendments." *Hartford Ins. Co.*, 422 F. Supp. 2d at 206. This is especially so in this breach of trust case, the crux of which involves trust records and information, which Defendants have or should have in their possession as the trustee for the trust fund accounts of both the original plaintiffs and the additional plaintiffs. *See Roberson v. Hayti Police Dep't*, 241 F.3d 992, 996 (8th Cir. 2001) (reversing a denial of leave to amend complaint in a civil rights case to add city as defendant where, *inter alia,* city had notice from plaintiff's initial complaint against the police department and "the bulk of the evidence the city would have required to defend itself was already

in the city's possession").[6]

D. Even Assuming *Arguendo* There Is Some Hardship to Defendants By Allowing The Amendment, There Are Compelling Reasons That The Hardship To The Additional Plaintiffs By Not Allowing The Amendment Outweighs Any Hardship To Defendants Such That Leave To Amend Should Be Granted

As stated above, Rule 15(a) contains a presumption in favor of amendments that the non-moving party bears the burden of defeating. Part of determining whether the non-moving party has met that burden "entails an inquiry into the hardship to the moving party if leave to amend is denied . . . ." 6 Charles A. Wright, *et al., Federal Practice and Procedure* § 1487; *accord Childers v. Mineta*, 205 F.R.D. 29, 32 (D.D.C 2001). In the present action, denial of leave to amend potentially would cause significant hardship to the additional plaintiffs, and that hardship should be considered and found to support granting leave to amend.

If leave to amend is denied, the potential hardship to the additional plaintiffs here is the typical one – limitations statutes issues. *See Peterson ex rel. Estate of Knipple v. Islamic Republic of Iran*, 2007 WL 950080, at *1 (with respect to proposed amendments that seek to add plaintiffs, "the chief policy consideration is that of the statute of limitations"). As the parties agreed in briefing Plaintiffs' Motion for Leave for Plaintiffs' Counsel to Send Court-Approved Notice to Members of the Putative Class of Plaintiffs, and for Members of the Putative Class to Have an Opportunity for

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[6] Motions to amend pleadings also may be defeated on grounds of futility. In this jurisdiction, as in many others, proposed amendments may be futile if they "would not survive a motion to dismiss." *James Madison, Ltd. v. Ludwig,* 82 F.3d 1085, 1099 (D.C. Cir. 1996), *cert. denied,* 519 U.S. 1077 (1997). Of course there is a pending motion to dismiss here which Plaintiffs have opposed. (Dkt. #s 58, 59). The merits of that motion have been briefed, and Plaintiffs will not supplement that briefing here; they only point out that the additional plaintiffs agree to be bound by all proceedings in this case if they are added.

Permissive Joinder as Plaintiffs before a Ruling on Class Certification, (Dkt. #s 73, 78, and 80), it is well-established that the commencement of this action as a class action tolls the running of applicable statutes of limitations for members of the putative class until such time as class certification is denied. *See* 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 1:3 (4th ed.), *citing American Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 552 (1974) and *Crown, Cork & Seal Co. v. Parker,* 462 U.S. 345, 353-54 (1983).

The tolling doctrine typically encompasses amendments to pleadings through the "relate back" doctrine. "When a complaint is timely filed, the statute of limitations is tolled, and subsequent amendments to the complaint are also regarded as timely." *Ciralsky v. C. I. A.,* 355 F.3d 661, 672 (D.C. Cir. 2004). Rule 15(c) provides for amendments of pleadings to relate back to the date of the original pleading. Fed. R. Civ. P. 15(c). In general, amendments adding plaintiffs "will relate back under Rule 15 (c) to the date of the original complaint, provided that the amended complaint states a claim which arises from the same conduct, transaction or occurrence set forth in the original pleading." *Peterson ex rel. Estate of Knipple v. Islamic Republic of Iran*, 2007 WL 950080, at *1 (citation omitted). "The defendant must also have had 'adequate notice of the new plaintiffs, and that the original suit in effect asserted their claims as well.'" *Id.*

These relate back tests are met easily in instances such as the present case, where an action was originally filed as a class action, and where a motion to amend only adds additional plaintiffs, who already were members of the putative class, without altering the original complaint otherwise. *See Sokolski v. Trans Union Corp.,* 178 F.R.D. 393, 398 (E.D.N.Y. 1998) (allowing relation back for later added plaintiffs "where the original complaint provided the defendants with adequate notice that a class action was contemplated and would be sought."). This is because the additional plaintiffs

were in effect already involved in the proceedings, and the defendant knew or should have known of their existence and involvement. *See Leachman v. Beech Aircraft Corp.,* 694 F.2d 1301, 1309 (D.C. Cir. 1982). But if leave to amend is denied, the additional plaintiffs will not be able to benefit from the relate back doctrine, and, assuming *arguendo* that any applicable statutes of limitations were tolled by the filing of the complaint in this action, the additional plaintiffs will face hardship in that they will have a very limited opportunity to intervene in this action or to file their own actions. This potential hardship should be considered in determining the Motion to Amend, and should counsel in favor of granting the amendment.

II. BECAUSE UNDER LCVR 15.1, MOTIONS TO AMEND PLEADINGS ARE NOT DEEMED TO BE FILED UNTIL THE DATE ON WHICH THE ORDER GRANTING THE MOTION IS ENTERED, THIS COURT SHOULD CONTINUE TO DEFER ITS RULING ON PLAINTIFFS' PENDING MOTION FOR CLASS CERTIFICATION UNTIL IT HAS RULED ON THEIR MOTION TO AMEND THE COMPLAINT

In addition to the general potential limitations statute hardship set forth above that the additional plaintiffs might endure if leave to amend is denied, there is a separate potential timing issue that they face here due to LCvR 15.1 even if leave ultimately is granted. This additional unique potential timing problem, however, is easily averted if this Court continues its deferral of its ruling on class certification until it rules on Plaintiffs' Motion to Amend. Plaintiffs explain this situation in more detail as follows.

Provided that an amendment otherwise satisfies Rule 15(a)'s requirements, there is "no legal or procedural impediment to the use of a motion to amend to add plaintiffs after class certification has been denied." *Voilas v. General Motors Corp.,* 173 F.R.D. at 394. It thus is common for

plaintiffs to seek amendments to complaints to add new plaintiffs following a denial of class certification. *See, e.g., Thomas v. Albright*, 139 F.3d 227, 229 (D.C. Cir. 1998), *cert. denied,* 525 U.S. 1016 (1998).

The present case is somewhat different, however, since Plaintiffs' Motion for Class Certification has not been denied and is still pending. As noted above, the commencement of this action as a class action tolled the running of any applicable statutes of limitations until such time as class certification is denied. Once certification is denied, any tolling stops, and any applicable statutes of limitations resume running. At this point those that would have been members of the class may either move to intervene or file their own action; provided that they do so before the expiration of the statute of limitations.

Concern regarding the possibly very limited post-class-certification-denial time frame for would-have-been class members to act led Plaintiffs to request expressly that this Court exercise its discretionary power to defer ruling on class certification until Notice had been sent to members of the putative class, and the members had had a reasonable opportunity to join the action. Plaintiffs were of the view that deferral was the best way for the Court to protect the rights and interests of putative class members, including the expiration of any statute of limitations.

This Court has deferred ruling on class certification at least to allow the Notice to be sent and for putative class members to respond. In light of LCvR 15.1, further deferral is needed to continue to best protect the rights and interests of putative class members that have affirmatively indicated that they wish to join this action.

Local Rule 15.1 provides:

> A motion for leave to file an amended pleading shall be accompanied by an original

> of the proposed pleading as amended. The amended pleading shall be deemed to have been filed and served by mail on the date on which the order granting the motion is entered.

LCvR 15.1; *accord* LCvR 7(I). Under Local Rule 15.1, a pleading sought to be amended by motion is filed only by the entry of the order granting the motion, not by the mere filing of the motion. Accordingly, the filing of Plaintiffs' Motion to Amend the Complaint here does not in and of itself effectuate the filing of the proposed Second Amended Complaint – the complaint is not filed unless and until this Court grants the motion and enters the order. Hence, notwithstanding the filing of the Motion to Amend, the additional plaintiffs need this Court to continue deferring a ruling on class certification until after it has ruled on the Motion to Amend.

Courts in other jurisdictions apparently have faced similar timing situations and have carefully addressed them procedurally to avoid or minimize compromising the rights and interests of additional plaintiffs who were putative class members. *See, e.g., Twarog v. Allen*, 2007 WL 2228635, at *1 (M.D. Ala. July 31, 2007) (magistrate recommends the denial of class certification, and having recommended the denial of class certification, grants plaintiffs' motion to amend the complaint to add new plaintiffs); *Bridges v. City of North Chicago*, 402 F.Supp. 418, 419 (N.D. Ill. 1975) (court grants plaintiffs' motion for leave to add new plaintiffs and to withdraw their class allegations on same date). The same result is respectfully requested here.

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Leave to File a Second Amended Complaint to Add Additional Plaintiffs, and for the Court to Continue to Defer its Ruling on Class Certification until it has Decided the Motion to Amend should be granted.

DATED this 1st day of December, 2008

Respectfully submitted,

/s/ Melody L. McCoy

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