UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

FRIENDS OF THE WILD SWAN INC., a Montana nonprofit corporation; ALLIANCE FOR THE WILD ROCKIES, INC., a Montana nonprofit corporation,

Plaintiff,

v.

ROBYN THORSON, Pacific Region Director, U.S. Fish and Wildlife Service; U.S. FISH AND WILDIFE SERVICE, an agency of the U.S. Department of the Interior; S.M.R. JEWELL, Secretary, U.S. Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, a federal executive department of the United States,

Defendant.

Case No. 3:16-CV-00681-AC

FINDINGS AND RECOMMENDATION

ACOSTA, Magistrate Judge:

Introduction

Plaintiffs, Friends of the Wild Swan, Inc. and Alliance for the Wild Rockies, Inc., (collectively "Plaintiffs"), filed this lawsuit challenging the legality of the recovery plan for the coterminous United States population of Bull Trout ("the Plan"), issued by the United States Fish

and Wildlife Service (the "Service") and Department of the Interior (the "Department"). Defendants, Robyn Thorson, Pacific Region Director of the Service, S. M. R. Jewell, Secretary of the Department, the Service, and the Department (collectively "Defendants"), moved to dismiss the lawsuit. (Defs.' Mot. Dismiss, ECF No. 18.) The district court dismissed Plaintiffs' complaint (the "Complaint"), the first eight claims with leave to amend and the ninth claim with prejudice, and the Ninth Circuit affirmed the district court's dismissal. *Friends of the Wild Swan, Inc. v. Thorson*, No. 3:16-cv-681-AC, 2017 WL 7310641 (D. Or. Jan. 5, 2017); *adopted*, 260 F. Supp. 3d 1338 (2017); *aff'd*, 745 Fed. Appx. 718 (9th Cir. 2018). Plaintiffs now request leave to amend the Complaint. (Pls.' Mot. Am. Compl., ECF No. 38 ("Pls.' Mot.").) The court finds Plaintiffs failed to establish both the requisite change in law or facts necessary to reopen the case under Rule 60 and, therefore, failed to set aside final judgment before filing an amended complaint under Rule 15. Therefore, the Motion fails procedurally, and the court recommends the Motion be denied.

Background

On April 19, 2016, Plaintiffs filed a complaint challenging the Plan under the Endangered Species Act (the "ESA") and the Administrative Procedure Act (the "APA"). (Compl., ECF No. 1.) Defendants moved to dismiss the Complaint for lack of subject matter jurisdiction, or in the alternative, for failure to state a claim under the ESA and the APA. (Defs.' Mot. Dismiss at 2.) In a Findings and Recommendation filed January 5, 2017, this court found Plaintiffs did not have a cause of action under the APA and the court lacked subject-matter jurisdiction over Plaintiffs' claims under the ESA (the "F & R"). *Thorson*, 2017 WL 7310641, at *1. This court recommended Defendants' motion be granted and the Complaint be dismissed in its entirety. *Id.*

In an Opinion and Order filed June 1, 2017, Chief District Judge Michael W. Mosman adopted the F & R in part, dismissed Plaintiffs' first eight claims under the ESA with leave to

amend the Complaint, and dismissed Plaintiffs' ninth claim under the APA with prejudice (the "Opinion"). *Thorson*, 260 F. Supp. 3d at 1345. Following the Opinion, this court instructed Plaintiffs to file an amended complaint on June 30, 2017. (Scheduling Order, ECF No. 32.) Plaintiffs did not file an amended complaint in a timely manner and informed the court on July 11, 2017, they did not intend to file an amended complaint. (Judgment, ECF No. 33.) This court entered a final judgment on July 11, 2017 (the "Judgment"). (Judgment.) On July 12, 2017, Plaintiffs appealed to the Ninth Circuit. (Notice of Appeal, ECF No. 34.) On October 15, 2018, the Ninth Circuit affirmed the Judgment. *Thorson*, 745 Fed. Appx. at 718. The Ninth Circuit expressly acknowledged the District Court dismissed the ESA claims without prejudice and Plaintiffs opted to appeal instead of amending the Complaint. *Id.* at 720.

On October 17, 2018, Plaintiffs filed a motion for leave to amend the Complaint under Federal Rules of Civil Procedure ("Rule") 15(b) and 60(b) (the "Motion") to allege two claims: "(1) a claim that the recovery criteria in the Bull Trout Recovery Plan are neither objective nor measurable; and (2) a claim that the recovery criteria in the Bull Trout Recovery Plan do not address the five delisting factors." (Pls.' Mot. at 2.) Defendants oppose the Motion, arguing this court does not have jurisdiction to consider the Motion. (Defs.' Resp. at 4, ECF No. 43.) Alternatively, Defendants contend the relevant *Foman* factors weigh against allowing amendment of the Complaint. (Defs.' Resp. at 9.)

Legal Standard

Three rules allow the court to amend final judgments. *Ciuffitelli v. Deloitte & Touche LLP*, No. 3:16-CV-00580-AC, 2017 WL 7312687, at *2 (D. Or. July 24, 2017). After a court has entered a final judgment, a party may seek to amend or alter, or seek relief from the final judgment, under

Rules 15(b), 59(e), and 60(b). *Id.*; *Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996). Plaintiffs do not plead Rule 59(e) and the court finds it is not relevant here.

I. Rule 15

Under Rule 15(b)(2), "[a] party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue." Rule 15 vests the court with discretion to allow amendments when "justice so requires," *Foman v. Davis*, 371 U.S. 178, 182 (1962), and is "to be applied with extreme liberality." *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1173 (9th Cir. 2017). The purpose of Rule 15 is to facilitate a proper decision on the merits. *Breier v. N. Cal. Bowling Proprietors' Ass'n*, 316 F.2d 787, 789 (9th Cir. 1963). However, "[a]fter final judgment has been entered, a Rule 15[] motion may be considered only if the judgment is first reopened under Rule 59 or 60." *Navajo Nation*, at 1173 (citing *Lindauer*, at 1356).

II. Rule 60

In contrast to Rule 15's extreme liberality, relief under Rule 60 "should be granted sparingly to avoid manifest injustice and only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Navajo Nation*, 876 F.3d at 1173 (internal quotation marks omitted). Rule 60(b) provides:

> the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud [], misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

FED. R. CIV. P. 60(b) (2019). Rule 60(b) lists six mutually exclusive grounds for relief from a final judgment. A movant is granted relief from final judgment when their record or facts correlate to one or more of the six grounds. The first five grounds are specific reasons a final judgment may become inequitable at no fault of the movant. The sixth ground is a narrowly interpreted catch-all provision. If the movant's record or facts do not correlate to the first five elements, then a court may exercise its discretion to grant relief under the sixth ground if there is "any other reason that justifies relief" and relief will "accomplish justice." *Klapprott*, 335 U.S. at 614. Although the catch-all provision vests the court with broad judicial discretion, case law emphasizes a movant's record or facts must reach the level of "extraordinary circumstances" to justify relief.

To establish extraordinary circumstances, "the movant must show the [new] evidence (1) existed at the time of the [original decision], (2) could not have been discovered through due diligence, and (3) was of such magnitude that production of it earlier would have been likely to change the disposition of the case." *Ciuffitelli*, 2017 WL 7312687, at *2. To promote the finality of judgment, Rule 60's higher burden effectively displaces Rule 15's lower burden. *Navajo Nation*, 876 F.3d at 1173.

Discussion

Plaintiffs move to amend the Complaint under Rule 15(b) and, if "necessary to set aside the judgment" under Rule 60. (Pls.' Mot. at 12.) Defendants oppose the motion to amend and assert this court does not have jurisdiction to entertain the Motion because Plaintiffs did not first file a motion to re-open or set aside the Judgment under Rule 60. Alternatively, Defendants argue

if the court has jurisdiction to review the Motion, the balance of factors relevant to a Rule 15 motion weighs against amending it.

The court finds Plaintiffs did file a motion to set aside the Judgment under Rule 60. Because Rule 60's higher burden effectively displaces Rule 15's lower burden, the issue before the court is whether the Motion meets Rule 60's higher burden to reopen a final judgment.

I. Rule 60

That part of the Motion which seeks to set aside the Judgment under Rule 60 fails, because Plaintiffs have not established a change in circumstances of law or fact, or other reasons to justify the relief requested.

Plaintiffs rely on Rule 60(b)(5) and (6) to set aside the Judgment; contending the environmental preservation of endangered species is a federal priority and an amendment would allow their claims to be determined on the merits. Plaintiffs contend granting the Motion will ensure Defendants comply with non-discretionary duties under the ESA relating to the bull trout, an endangered species. Plaintiffs also argue the public interest in the Plan is a sufficient reason to grant the Motion. Lastly, Plaintiffs argue hearing the issue on the merits is appropriate in the interest of judicial efficiency "because [if not heard at present] other plaintiffs will litigate th[ese] claims . . . in other federal courts" in the future. (Pls.' Reply at 5.) Defendants oppose the Motion and argue Plaintiffs' bare assertions do not establish an entitlement to relief under Rule 60(b)(5) and (6). The court finds Plaintiffs' Rule 60 motion fails under both Rule 60(b)(5) and (6).

A. Rule 60(b)(5)

Rule 60(b)(5) provides a court "may relieve a party . . . from a final judgment, order or proceeding" if "applying [the original judgment] prospectively is no longer equitable." The party seeking relief bears the burden to establish "changed circumstances." *Horne v. Flores*, 557 U.S.

433, 447 (2009). A change in circumstances is "a significant change either in factual conditions or in law render[ing] continued enforcement detrimental to the public interest." *Id.* at 447 (internal quotation marks omitted).

Rufo v. Inmates of Suffolk Cnty. Jail is the seminal United States Supreme Court case to analyze change of circumstances. 502 U.S. 367 (1992); s*ee, e.g.*, *Horne*, at 447–48 (the Court implements *Rufo* analysis when modifying a final judgment under Rule 60(b)(5)). *Rufo* implements a flexible change in circumstances analysis. *Id.* at 382. Under *Rufo*, unforeseen obstacles making compliance to a final judgment difficult or unworkable is a change in circumstances. *Id.* at 384. However, a change in circumstances is not a party relying on anticipated and foreseeable events or obstacles making compliance to a final judgment difficult or unworkable. *Id.*

Under *Rufo*, a change in circumstances makes a final judgment "impermissible under federal law" and requires modification. *Id.* at 388. However, a change in circumstances is not a "clarification in the law," unless the parties show they "based their agreement on a misunderstanding of the governing law." *Id.* Further, when considering a change in circumstances under Rule 60(b)(5) "a court should surely keep the public interest in mind" but the court should not modify the final judgment "more [than] equity requires." *Id.* at 391.

Here, Plaintiffs failed to show a change in circumstances in law or fact under *Rufo*. Plaintiffs contend the changed circumstances entitling them to relief is "the [Ninth C]ircuit's memorandum ruling that the claims Plaintiffs wanted to argue could not be specifically found in [Plaintiffs'] original Complaint," and the Judgment must be set aside to allow Plaintiffs to assert those claims. (Pls.' Reply at 4, ECF No. 44.)

The Ninth Circuit's ruling on Plaintiffs' appeal is not a change of circumstances in law or in fact. Plaintiffs rely on the Ninth Circuit's unfavorable ruling and clarification in the law to establish a change in circumstances. An unfavorable ruling on appeal is a foreseeable event. Plaintiffs cannot rely on a foreseeable failed appeal to establish a change in circumstances in law or fact. Further, the Ninth Circuit's judgment clarifies which claims were not present in the pleading. A clarification of the law is not a change in circumstances unless Plaintiffs can show they based their argument on a misunderstanding of the law. Plaintiffs do not argue they misunderstood the law and, therefore, do not establish a change in circumstances of law or fact.

Moreover, Plaintiffs incorrectly rely on *Ctr. for Biological Diversity v. Norton*, No. 01CV2101IEGLAB, 2003 WL 22225620, at *3 (S.D. Cal. Sept. 9, 2003), which is distinguishable from this case. In *Norton*, the court's order enforced a timeline for the Service "to issue new proposed and final critical habitat determinations for several plant species." *Id.* at 1. Under Rule 60(b)(5), the Service requested relief from final judgment because the Service depleted its annual budget and lacked funding to carry out the order. *Id.* Following the order's timeline would cause the Service to spend more money than Congress appropriated, violating the Anti-Deficiency Act. *Id.* at 3. Without proper funding, carrying out the order "would place an unjustified burden on [the Service] and possibly lead to hastily-manufactured habitat designations." *Id.* at 3. The change in circumstances made the order "unworkable . . . impermissible under federal law . . . [and] detrimental to the public interest" in the finality of judgments and, therefore, justified relief. *Id.* at 3–4. Here, Plaintiffs' failed litigation strategy does not make the Judgment unworkable, impermissible, or detrimental to the public interest in the finality of judgments and is therefore distinguishable from *Norton*.

Plaintiffs have not established a change in circumstances in law or fact. Therefore, Plaintiffs have not met their burden to warrant equitable relief from the Judgment under Rule 60(b)(5).

B. Rule 60(b)(6)

Rule 60(b)(6) provides a court "may relieve a party . . . from a final judgment, order or proceeding" for "any other reason that justifies relief." "[T]he language of the 'other reason' clause . . . vests power in courts . . . to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. U.S.*, 335 U.S. 601, 614 (1949). Relief from final judgment is appropriate if the petitioner can "establish the existence of extraordinary circumstances." *Mackey v. Hoffman*, 682 F.3d 1247, 1251 (9th Cir. 2012). Relief from final judgment is not appropriate "for a free, calculated, deliberate choice," and "where neither the circumstances of petitioner nor excuse . . . is so extraordinary to bring [them] within Rule 60(b)(6)." *Id.* at 1251. Rule 60(b)(6) is "used sparingly as an equitable remedy to prevent manifest injustice." *Stull v. Lewis & Clark Coll.*, No. 3:12-CV-1556-AC, 2014 WL 3512495, at *1 (D. Or. July 10, 2014) (quoting *Lal v. Cal.*, 610 F.3d 518, 524 (9th Cir. 2010).

For example, in *Klapprott v. U.S.* the Court found a U.S. "citizen [who] was stripped of his citizenship by his Government, without evidence, a hearing, or the benefit of counsel" for four years constituted manifest injustice and extraordinary circumstances. 335 U.S. 601, 615 (1959). Conversely, in *Ackermann v. U.S.* the Court held a tactical, calculated, and deliberate choice to not appeal does not constitute extraordinary circumstances because the decision, although in hindsight wrong, was made freely. 340 U.S. 193, 196–97 (1950).

Further, in *Navajo Nation v. Dep't of the Interior* the Ninth Circuit held that although the district court denied plaintiff relief from judgment and denied a motion to amend, effectively

dismissing plaintiff's claims with prejudice—because the relevant statutes of limitations had run on those claims—it did not constitute extraordinary circumstances or manifest injustice. 876 F.3d at 1173–74. It was not an extraordinary circumstance because plaintiff "amended its complaint twice before the court dismissed the claims. Although the [plaintiff] argues that it amended its complaint each time for other reasons, [they] had ample opportunity at those junctures to address the deficiencies in its pleading—deficiencies which, at least at the time the Second Amended Complaint was filed," plaintiff knew existed or should have known existed. *Id.* Further, plaintiff had time to seek leave to amend again after the Second Amended Complaint. *Id.; see also Premo v. Martin*, 119 F.3d 763, 772 (9th Cir. 1997) (plaintiffs had "ample opportunity to file an amended complaint with new allegations before the court issued its final judgment"). Because plaintiff could not establish extraordinary circumstances, the court denied relief from final judgment under Rule 60(b)(6).

Conversely, in *Phelps v. Alameida*, extensive procedural hurdles established extraordinary circumstances and triggered judicial discretion under Rule 60(b)(6) to grant relief. 569 F.3d 1120, 1123 (9th Cir. 2009). Preliminary procedural issues prevented hearing of the Constitutional issues raised in the plaintiff's petition for *habeus corpus* for eleven years. *Id.* at 1141. The plaintiff's claim "traveled up and down the federal apparatus three separate times" and "not a single federal judge examined the substance" of the claim. *Id.* The Ninth Circuit labeled *Phelps* as "the epitome of [the court's] obsession with form over substance." *Id.* The Ninth Circuit found the eleven-year procedural delay established extraordinary circumstances and outweighed the public interest in the finality of judgments. *Id.* at 1135, 1141. The Ninth Circuit granted the plaintiff relief under Rule 60(b)(6) and reversed the denial of plaintiff's motion to reconsider. *Id.* at 1141.

In contrast, the procedural hurdle in *Burch v. Snider*, 87 F.R.D. 546 (D. Md. 1979), did not trigger judicial discretion under Rule 60(b)(6). The court dismissed the plaintiff's complaint for failure to state a claim and for lack of jurisdiction. *Id.* The plaintiff then moved for relief from final judgment to amend the complaint. *Id.* 546. Plaintiff argued relief would allow him "to avoid the [procedural] problems [in the complaint] that the [c]ourt found in its" final judgment leading to the dismissal. *Id.* The court found avoiding procedural problems was not a basis to trigger the court's judicial discretion under Rule 60(b)(6). *Id.* at 547. The court held relief was not justified under Rule 60(b)(6). *Id.*

Here, Plaintiffs do not have a record or facts establishing extraordinary circumstances to trigger judicial discretion under Rule 60(b)(6). Like *Navajo Nation*, Plaintiffs here were invited to amend the Complaint and had opportunity to seek leave to amend before appealing. Instead, Plaintiffs made a tactical, calculated, and deliberate choice not to amend the Complaint, and like *Ackermann*, a choice made freely does not constitute extraordinary circumstances.

However, unlike *Navajo Nation*, a denial of the Motion will not effectively dismiss Plaintiffs' claims with prejudice. Here, Plaintiffs can replead their first eight claims to survive a motion to dismiss, and then be heard on the merits. Plaintiffs argue hearing this issue on its merits in this court is appropriate in the interest of judicial efficiency "because other plaintiffs will litigate the claims . . . in other federal courts" in the future. This argument is inapposite and fails to address the rule of law the court must apply to this case and future cases like these.

Further, Plaintiffs argue the court's finding of error on appeal is an extraordinary circumstance and justifies relief. As in *Burch*, Plaintiffs here moved for relief to avoid procedural problems the Ninth Circuit acknowledged, and that mere acknowledgment is not a basis to trigger

judicial discretion. Therefore, Plaintiffs do not establish extraordinary circumstances to justify relief under Rule 60(b)(6).

Moreover, *Phelps* does not aid Plaintiffs here because it is distinguishable from this case. Unlike *Phelps*, Plaintiffs' procedural hurdle did not cause an eleven-year delay or establish other extraordinary circumstances. Additionally, Plaintiffs' record and facts did not establish extraordinary circumstances to outweigh the public interest in the finality of judgments. Therefore, Plaintiffs' record and facts does not trigger judicial discretion and relief is not justified under Rule 60(b)(6).

Lastly, Plaintiffs argue they did not amend the Complaint after this court's ruling, to test their claims before the Ninth Circuit. Plaintiffs contend if they had amended the Complaint before appealing to the Ninth Circuit, the claims this court dismissed would be waived on appeal because the amended complaint would supersede the Complaint. Plaintiffs further argue this strategy was reasonable because the court acknowledged "binding authority on this issue is scant." (Pls.' Mot. at 6.)

Plaintiffs' argument is incorrect. The Ninth Circuit has held a plaintiff waives all claims not realleged in an amended complaint, *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), however, it overruled the *Forsyth* decision in part, finding "the plaintiff does not forfeit the right to challenge the dismissal on appeal simply by filing an amended complaint that does not re-allege the dismissed claim." *Lacey v. Maricopa Cty*, 693 F.3d 896, 927 (9th Cir. 2012) (internal references omitted). Therefore, under *Lacey*, Plaintiffs' argument is incorrect, and Plaintiff rightfully had, but did not use, the opportunity to amend the Complaint.

In conclusion, Plaintiffs do not establish a record or facts applicable to the first five grounds of Rule 60(b) and, Plaintiffs fail to establish extraordinary circumstances to trigger

judicial discretion under the sixth ground of Rule 60(b). Consequently, Plaintiffs fail to outweigh the public interest in the finality of judgments and, therefore, the relief requested cannot be granted under Rule 60(b).

I. Rule 15

Plaintiffs' Rule 15 motion fails procedurally because they first did not support a motion to set aside the Judgment under Rule 60. The court finds *Lindauer* instructive in this instance. In *Lindauer*, the district court dismissed the action with prejudice. *Lindauer*, 91 F.3d at 1356; *see also*, *Allmerica Financial Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664 (9th Cir. 1997). Plaintiffs then moved to amend their complaint under Rule 15, which the district court denied. *Id.* at 1357. The Ninth Circuit affirmed the district court and held if a final judgment is entered, a motion to amend under Rule 15 is not appropriate unless the final judgment is first set aside under Rule 59 or 60. *Id.*

As in *Lindauer*, the court here dismissed the Complaint and entered the Judgment. Plaintiffs then filed a Rule 15 motion. Plaintiffs did not support a motion to set aside the final judgment under Rule 60 before filing the Rule 15 motion. Therefore, Plaintiffs' Rule 15 motion fails procedurally.

Even if Plaintiffs had successfully moved to set aside the Judgment under Rule 60, their Rule 15 motion should be denied because the *Foman* factors weigh against granting it. Plaintiffs contend amending the complaint is appropriate "[b]ecause both [the District Court] and the Ninth Circuit have acknowledged or implied that there are violations of non-discretionary duties that *could* be alleged in this case, but *have not yet* been alleged." (Pls.' Mot. at 10–11.) Defendants argue amending the Complaint after litigation concluded constitutes undue delay and resulted in

prejudice. Defendants also argue the Motion should not be granted because Plaintiffs had previous opportunity to amend the Complaint but elected not to do so.[1]

A. Undue Delay

Defendants argue Plaintiffs' decision to amend the Complaint after litigation concluded constitutes undue delay. "Where the party seeking amendment knows or should know of the facts upon which the proposed amendment is based but fails to include them in the original complaint, the motion to amend may be denied." *E.E.O.C. v. Boeing Co.*, 843 F.2d 1213, 1222 (9th Cir. 1988), *cert. denied*, 488 U.S. 889 (1988); *see also Jackson v. Bank of Haw.*, 902 F.2d 1385, 1388 (9th Cir. 1990). Undue delay is relevant, but alone is not a determinative factor. *Fulton v. Advantage Sales & Mktg., LLC*, No. 3:11-CV-01050-MO, 2012 WL 5182805, at *1 (D. Or. Oct. 18, 2012) (citing *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999)).

The Motion constitutes undue delay because the claims and facts Plaintiffs seeks to add were known or should have been known to them before they filed the Complaint. Plaintiffs were aware or should have been aware of both claims Plaintiffs now seek to add because they are fundamental concepts of the ESA and are partially plead in the Complaint. The first claim and facts were plainly known or should have been known to Plaintiffs because the Complaint recites section 1533(f)(1)(B)(ii) on objective and measurable criteria. (Compl. at 14, 16.) The second claim was plainly known or should have been known to Plaintiffs because the Complaint formulaically recites § 1533(f) on delisting criteria. (Compl. at 14.) Plaintiffs argue the amendment is proper because Ninth Circuit brought the claims to their attention after final judgment on appeal, however, the Complaint proves otherwise. The Complaint proves the claims

[1] Defendants do not assert Plaintiffs acted with bad faith, had a dilatory motive in seeking to amend the Complaint or that such amendment would be futile.

and facts Plaintiffs seeks to add were known or should have been known to them before they filed the Complaint.

Moreover, despite the Complaint's failure to allege these claims, the court gave Plaintiffs an opportunity to amend the Complaint, and Plaintiffs elected to appeal instead. Plaintiffs cannot now assert claims and facts after litigation has concluded when they had the opportunity to amend the Complaint earlier. Whether a poor litigation strategy or a poor reading of the statute, Plaintiffs' failure to amend the Complaint before litigation concluded constitutes undue delay.

B. Prejudice to the Opposing Party

Defendants argue allowing Plaintiffs to amend the Complaint would cause them to spend additional resources to relitigate the case on theories not properly raised before this court or on appeal. Amendment causes substantial prejudice when it creates additional discovery or cost, either by "greatly chang[ing] the nature of the litigation or causing an inordinate delay." *City of Portland v. Iheanacho*, No. 3:17-CV-0401-AC, 2018 WL 1426564, at *7 (D. Or. Mar. 22, 2018) (internal quotation marks omitted). When determining whether or not to grant leave to amend, prejudice against the non-moving party is the most important factor. *Aspeon, Inc.*, 316 F.3d at 1052. Here, the court has already found the amendment would cause an inordinate delay. Plaintiffs could have avoided these issues had they amended the Complaint before appealing to the Ninth Circuit. Therefore, Defendants would suffer prejudice if Plaintiffs' amendment was granted at this late date.

C. Failure to Previously Amend

Defendants contend the court should not give Plaintiffs a second opportunity to amend the Complaint because Plaintiffs failed to previously amend and elected to appeal instead. The court's discretion to deny a motion to amend is especially broad "where the court has already given a

plaintiff one or more opportunities to amend [the] complaint." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 n.3 (9th Cir. 1987). The district court invited Plaintiffs to amend the Complaint and Plaintiffs chose instead to appeal to the Ninth Circuit. Plaintiffs' failed litigation strategy to not previously amend does not justify amendment now. For the reasons above, even if Plaintiffs were able to set aside the Judgment under Rule 60, Plaintiffs' Rule 15 motion should be denied because the *Foman* factors weigh against granting it.

Conclusion

Plaintiffs' Motion (ECF No. 38) for Leave to File a First Amended Complaint should be DENIED.

Scheduling Order

The Court will refer its Findings and Recommendation to a district judge. Objections, if any, are due within fourteen (14) days. If no objections are filed, the Findings and Recommendation will go under advisement on that date. If objections are filed, a response is due within fourteen (14) days. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 10th day of April, 2019.

JOHN V. ACOSTA
United States Magistrate Judge