IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

XP VEHICLES, INC. *et al*.,	)	
Plaintiff,	)	
v.	)	Case No. 1:13-cv-00037 (KBJ)
THE UNITED STATES DEPARTMENT OF ENERGY *et al.*,	)	
Defendants.	)	

MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, Plaintiffs XP Vehicles, Inc. and Limnia, Inc., through their counsel, move for leave to amend their complaint.[1] As grounds therefore, plaintiffs provide as follows:

The original Complaint, filed on January 10, 2013, alleges that Messrs. Chu and Seward used two Department of Energy ("DOE") loan programs to reward political patrons and advance their own political interests, rather than to fairly review plaintiffs' loan applications; this resulted in violations of plaintiffs' due process rights as well as violations of the Administrative Procedure Act. Plaintiffs' proposed amendment would clarify its constitutional claims by adding a Fifth Amendment equal protection claim against DOE and DOE officials for failing to treat Plaintiff's Advanced Technology Vehicle Manufacturing ("ATVM") Loan Program applications fairly and equally.[2] Plaintiffs also seek to add a due process claim against DOE and the official capacity defendants on similar grounds to those alleged in connection with the due process

[1] Plaintiffs' counsel consulted with defendants' counsel regarding this motion and defendants expressed an intention to file an opposition. *See* Loc. Civ. R. 5.4(m).
[2] A copy of the amended complaint plaintiffs seek to file is attached hereto, as provided by Local Civil Rules 15.1 and 5.4(i).

claims against the individual capacity defendants. Plaintiffs' new claims are supported by defendants' behavior as alleged in the complaint, and plaintiffs do not seek to add additional facts. The Court should allow plaintiffs to file their amended complaint because there has not been undue delay, defendants would not be prejudiced, and the amendments would not be futile.[3]

ARGUMENT

Rule 15(a) provides that leave to amend shall be freely given when justice requires. "Leave to amend a complaint should be freely given in the absence of undue delay, bad faith, undue prejudice to the opposing party, repeated failure to cure deficiencies, or futility." *Richardson v. United States*, 193 F.3d 545, 548-49 (D.C. Cir. 1999). The United States Supreme Court has declared that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Davis v. Liberty Mut. Ins. Co.*, 871 F.2d 1134, 1136 (D.C. Cir. 1989). Thus, the burden is on the opposing party to show that there is reason to deny leave. *In re Vitamins Antitrust Litigation*, 217 F.R.D. 30, 32 (D.D.C. 2003). The Supreme Court explained that "if the underlying facts or circumstances relied upon by a plaintiff may be a proper source of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182.

The law is well-settled that leave to amend a pleading should be denied only where there is undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice, or futility of amendment. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). The grant or denial of leave to amend is committed to the sound discretion of the district court. *Anderson v. USAA Cas. Ins. Co.*, 218 F.R.D. 307, 310 (D.D.C. 2003).

[3] Defendants could not demonstrate bad faith or dilatory motive on Plaintiffs' part. To the contrary, Plaintiffs seek to amend their claims to more thoroughly frame the relevant constitutional issues before this Court. Moreover, Plaintiffs have requested no previous amendments to the pleadings. Therefore, there is no basis to conclude that Plaintiffs have repeatedly failed to cure deficiencies by previous amendments.

I. Plaintiffs are entitled to amend their complaint because there has not been undue delay

Plaintiffs have not unduly delayed in bringing this motion to amend. The United States Court of Appeals for the District of Columbia has held that "[w]here an amendment would do no more than clarify legal theories or make technical corrections . . . delay, without a showing of prejudice, is not a sufficient ground for denying the motion." *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999); *see also Atchinson v. District of Columbia*, 73 F.3d 418, 426 (D.C. Cir. 1996) (holding that in order to determine the severity of the delay, the court considers any resulting prejudice the delay may cause); *Estate of Gaither v. District of Columbia*, 272 F.R.D. 248, 252 (D.D.C. 2011) ("[T]he mere passage of time does not preclude amendment—the delay must result in some prejudice to the judicial system or the opposing party."). Plaintiffs' proposed amendment would merely clarify the constitutional claims upon which they rely without significantly expanding or altering the scope of this action.

Even should defendants claim that there was undue delay in plaintiffs' attempt to amend their complaint, any alleged delay has been slight, particularly since this case is still at an early stage in litigation. Thus, there is no risk or unduly increasing discovery or delaying trial. *N. Am. Catholic Educ. Programming Found., Inc v. Womble, Carlyle, Sandridge & Rice, PLLC*, 887 F. Supp. 2d 78, 83 (D.D.C. 2012); *Heller v. District of Columbia*, No. 08-1289, 2013 U.S. Dist. LEXIS 38833, at *8 (D.D.C. Mar. 20, 2013) ("A case's position along the litigation path proves particularly important in that [hardship] inquiry: the further the case has progressed, the more likely the opposing party is to have relied on the unamended pleadings."); *Harrison*, 174 F.3d at 253. In fact, courts have granted leave to amend even after plaintiffs had "five previous attempts to state [a] cognizable claim . . . because [the] Federal Rules suggest [that the] 'artless drafting of a complaint should not allow for the artful dodging of a claim.'" *Driscoll v. George Washington*

Univ., No. 12-0690, 2012 U.S. Dist. LEXIS 127870, at *7 (D.D.C. Sept. 10, 2012) (alteration in original) (quoting *Poloron Prods., Inc. v. Lybrand Ross Bros. & Montgomery*, 72 F.R.D. 556, 561 (S.D.N.Y. 1976)). There is thus no undue delay, and plaintiffs should be allowed to file their amended complaint.

II. Plaintiffs are entitled to amend their complaint because defendants will not be prejudiced

Defendants will not be prejudiced by Plaintiffs' amended complaint. The "'liberal concepts of notice pleading" is to make the defendant aware of the *facts*." *Harrison*, 174 F.3d at 253 (emphasis added) (quoting *Hanson v. Hoffman*, 628 F.2d 42, 53 (D.C. Cir. 1980)). Accordingly, a plaintiff is not bound by the legal theories originally alleged unless a defendant is prejudiced on the merits. *Id.* The addition of an equal protection claim against DOE and Messrs. Chu and Seward, as well as a due process claim against DOE and the official capacity defendants, does not substantially change the theory on which the case has been proceeding since the amended complaint will continue to allege constitutional violations based on the behavior allege in the original complaint. *See Djourabchi v. Self*, 240 F.R.D. 5, 13 (D.D.C. 2006) ("Where 'the amendment substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation the court may deem it prejudicial.'") (quoting *Zenit Radio Corp v. Hazeltine Research Inc.*, 401 U.S. 321 (1971)); *Heller*, 2013 U.S. Dist. LEXIS 38833, at *8. Neither is the addition of equal protection claims and a due process claim an issue "remote from the other issues in the case" since plaintiffs have already brought due process claims based on the same facts. *Djourabchi*, 240 F.R.D. at 13. Therefore, Defendants will not be "required to engage in significant new preparation" in responding to Plaintiffs' new claims. *Id.*

This court has previously allowed a plaintiff to amend the constitutional theories upon which it relied. In *Larker v. Allan*, the plaintiff was granted leave to amend his complaint to drop a discrimination and equal protection claim and add a due process claim based on the failure of defendants to comply with their own regulations. No. 87-2780, 1991 U.S. Dist. LEXIS 10265, at *1 n.1 (D.D.C. July 23, 1991). Similarly, Plaintiffs in this case seek to refine their claims of the constitutional harms they suffered from defendants' behavior described in the complaint.

III. Plaintiffs are entitled to amend their complaint because their amendments would not be futile

Plaintiffs' proposed amendments are not futile. "A district court may deny a motion to amend a complaint as futile if the proposed claim would not survive a motion to dismiss." *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (citing *James Madison Ltd by Hecht v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996)). In order to survive a motion to dismiss, a complaint must have facial plausibility allowing the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The court must construe the complaint in favor of the plaintiff and grant plaintiff the benefit of all inferences derived from the facts. *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979).

The Fifth Amendment's Equal Protection Clause directs that all persons similarly situated should be treated alike. *United States Dep't of Agriculture v. Murry*, 413 U.S. 508, 517 (1973) (Marshall, J., concurring). The D.C. Circuit has stated that "[a] central purpose of the equal protection guarantee is to shield the politically impotent from capricious action by the majority." *Cmty-Serv. Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1125 n.4 (D.C. Cir. 1978). Thus, applicants with political capital should not receive an advantage relative to similarly situated and equally eligible applicants that lack such political connections. *See Cutts v. Fowler*,

692 F.2d 138, 141 (D.C. Cir. 1982) (explaining that "[a]nti-nepotism rules play a legitimate and laudatory role in preventing conflicts of interest and favoritism").

On its face, Plaintiffs' complaint alleges political favoritism, which can provide the basis for an equal protection claim. In *Hornsby v. Allen*, the court found that the standards of due process and equal protection were not met when city officials denied an applicant's liquor license, stating, "If one applicant for a license is preferred over another equally qualified as a political favor or as the result of a clandestine arrangement, the disappointed applicant is injured[.]"). 326 F.2d 605, 609-10 (5th Cir. 1964) (cited by this Court and the D.C. Circuit). Likewise, Plaintiffs allege that DOE and Messrs. Chu and Seward denied their ATVM and LGP Loan Program applications while granting funds to politically connected applicants in violation o Plaintiffs' right to equal protection.[4]

Similarly, Plaintiffs seek to add a due process claim against DOE and the official capacity defendants. Plaintiffs' opposition to the individual federal defendants' motion to dismiss, filed this same day, clearly explains how defendants' actions violated their due process rights.[5] The amendments Plaintiffs seek to make to their complaint are thus not futile and should be permitted.[6]

IV. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant it leave to file the attached Amended Complaint.

[4] To the extent that Defendants argue that *Bivens* review is precluded because of qualified immunity and the absence of a private right of action, Plaintiffs direct the Court to its arguments in its Opposition to Defendants' Motion to Dismiss.

[5] To the extent necessary, those arguments are incorporated herein by reference.

[6] This is especially true in light of the government's legitimate interest in preventing corruption, *Emily's List v. FEC*, 581 F3d 1, 34 (D.C. Cir. 2009), Plaintiffs should be able to assert their equal protection rights to combat"[t]he evils of cronyism and political favoritism" *American Fed'n of Gov't Emps. v. Office of Personnel Mgmt.*, 618 F. Supp. 1254, 1262 (D.D.C. 1985).