United States District Court
for the
Southern District of Florida

Michael Van Cleve, Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 20-23611-Civ-Scola
Wilbur L. Ross, U.S. Secretary of Commerce, and others, Defendants.	)	
	)	

Order Granting Motion to Amend Complaint

This matter is before the Court on the Plaintiff's revised motion for leave to file a second amended complaint. (Pl.'s Mot., ECF No. 38.) This lawsuit arises from the Plaintiff's claim that "race is a myth based on pseudoscience" such that the Census, which requires respondents to report their race, perpetuates arbitrary data that results in discrimination against groups of people who are not accurately represented by the different race options from which the Census requires them to pick. (*See, e.g.*, ECF No. 38-1 at ¶306.) The Plaintiff previously filed a first amended complaint prior to the Defendants' filing a response. (First Am. Compl., ECF No. 16.) The Plaintiff seeks to amend the complaint in order to add allegations challenging the Census on the basis that it does not include "Middle Eastern or North African" as a race or ethnicity option. (ECF No. 38-1 at ¶50.) Having reviewed the record, the parties' briefs, and the relevant legal authorities, the Court **grants** the motion (**ECF No. 38**).

In accordance with Federal Rule of Civil Procedure 15(a)(2), a party seeking to amend its complaint may do so only with the opposing party's written consent or the court's leave. According to the rule, leave should be freely given when justice so requires. Rule 15(a) reflects a policy of "liberally permitting amendments" and absent a "substantial reason to deny leave to amend" a plaintiff's request should be granted. *Espey v. Wainwright,* 734 F.2d 748, 750 (11th Cir. 1984). "Although leave to amend shall be freely given when justice so requires, a motion to amend may be denied on numerous grounds such as undue delay, undue prejudice to the defendants, and futility of the amendment." *Maynard v. Bd. of Regents of Div. of Universities of Florida Dep't of Educ. ex rel. Univ. of S. Florida*, 342 F.3d 1281, 1287 (11th Cir. 2003) (quotations omitted). "[L]eave to amend should not be denied on the ground of futility unless the proposed amendment is clearly insufficient or frivolous on its face." *Montes v. M & M Mgmt. Co.*, No. 15-80142-CIV, 2015 WL 11254703, at *1 (S.D. Fla. May 12, 2015) (Marra, J.) (citing *Davis v. Piper Aircraft Corp.,* 615 F.2d 606, 613 (4th

Cir.1980)). In order to deny leave to amend, the Court must identify a "justifying reason." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

After the Defendants moved to dismiss the original complaint on the grounds that it failed to allege a harm or redressability, the Plaintiff filed the instant motion to further develop the ways in which the Census purportedly harms respondents by failing to use reliable or comprehensive race-based data and response options. Without passing judgment on any future motion to dismiss, the Court finds that the Plaintiff's counterarguments just barely squeak by the low futility standard and warrant leave to amend at this early stage of the proceedings. The standard for futility requires "clear insufficiency" or "frivolity" on the face of the pleading, and that standard is not met here. *See Montes*, 2015 WL 11254703, at *1. Specifically, the second amended complaint points to data showing that if the "Middle Eastern or North African" category had been included in the Census, it would have been chosen by respondents; relatedly, purportedly overbroad categories such as White, Black, or Hispanic would have been chosen less frequently. (ECF No. 42 at 2.) This is consistent with the crux of the Plaintiff's lawsuit, which claims that the current race data collected by the Census is unreliable because it does not allow respondents to identify as Middle Eastern or North African. Again, at this stage, the Court cannot find that the allegations and issues raised by the Plaintiffs are futile as a matter of law. Rather, a motion to dismiss, with its attendant briefing, would be the best way to fully resolve the issues presented by the motion—including the question of standing.

Accordingly, the Court finds no "substantial reason" at this early stage of the litigation why the Plaintiff should be denied leave to amend. The Court emphasizes that its decision to grant leave to amend has been made in accordance with the applicable futility standard only and not the standard that would apply to a fully briefed motion to dismiss. The Court therefore **grants** the Plaintiffs' motion for leave to amend (**ECF No. 38**) and orders the Plaintiff to file his second amended complaint (without any yellow or other highlighting) by **December 30, 2020**. Additionally, the Court **denies as moot** the Defendants' motion to dismiss the prior pleading (**ECF No. 30**) and **denies as moot** the Plaintiff's original motion for leave to amend the complaint (**ECF No. 32**). *See Taylor v. Alabama*, 275 F. App'x 836, 838 (11th Cir. 2008) (noting that when the plaintiffs amended their complaint the defendants' motion to dismiss became moot).

The parties are also advised that the instant Order has no bearing on the outcome of the Court's December 21, 2020 Order to Show Cause. Failure to timely file the amended complaint may result in sanctions, including dismissal.

Done and ordered at Miami, Florida, on December 28, 2020.

Robert N. Scola, Jr.
United States District Judge