

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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TUNICA-BILOXI TRIBE OF LOUISIANA;))
RAMAH NAVAJO SCHOOL BOARD, INC.,))
))
Plaintiffs,)	Case No. 1:02CV02413
)	Judge Reggie B. Walton
v.)	Magistrate Judge Deborah A. Robinson
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UNITED STATES of AMERICA;))
MICHAEL O. LEAVITT, Secretary of the))
United States Department of Health and Human))
Services; DIRK KEMPTHORNE, Secretary))
of the United States Department of the Interior,))
))
Defendants.))
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**REPLY IN SUPPORT OF DEFENDANTS’ MOTION FOR CLARIFICATION OF THE
COURT’S OPINION AND ORDER OF SEPTEMBER 22, 2008**

Defendants, by and through undersigned counsel, hereby submit this Reply in Support of their Motion for Clarification of the Court’s Memorandum Opinion and Order dated September 22, 2008.

1. In Defendants’ Motion, Defendants seek clarification on whether the dismissal of Plaintiffs’ claims for monetary relief against Defendant Kempthorne, Secretary of the U.S. Department of the Interior (“DOI”), should be “with” or “without” prejudice. In their Motion, Defendants cited authority explaining that when dismissals are “without prejudice,” they are generally non-final and unappealable because there is a basis upon which the plaintiff is able to amend the complaint or otherwise cure the basis for the dismissal. See Semtek Int’l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505 (2001); Ciralsky v. CIA, 355 F.3d 661, 666 (D.C. Cir. 2004); Firestone v. Firestone, 76 F.3d 1205, 1209 (D.C. Cir. 1996); In re Interbank Funding

Corp. Sec. Litig., 432 F. Supp. 2d 51, 54 (D.D.C. 2006), vacated in part on other grounds by Belizan v. Hershon, 495 F.3d 686 (D.C. Cir. 2007); see also Andrx Pharm., Inc. v. Biovail Corp., 256 F.3d 799, 807 (D.C. Cir. 2001) (explaining that dismissal of pleading for lack of standing should be with prejudice only when there is no possibility that the plaintiff could allege sufficient facts to show standing). There is no basis here upon which Plaintiffs could amend their Complaint to state a claim against Secretary Kempthorne such that they would have standing to sue him for monetary relief.

2. In their Opposition, Plaintiffs argue that all dismissal on jurisdictional grounds are without prejudice. This is incorrect. Many courts have dismissed claims with prejudice when the plaintiff lacked Article III standing. See, e.g., Wagner v. Wainstein, No. 05-5135, 2005 WL 3782946, at *1 (D.C. Cir. July 28, 2005); Toledo Coal. for Safe Energy v. Nuclear Regulatory Comm'n, No. 95-1590, 1996 WL 734190, at *1 (D.C. Cir. Nov. 26, 1996); Long Term Care Pharmacy Alliance v. UnitedHealth Group, Inc., 498 F. Supp. 2d 187, 195 (D.D.C. 2007); Citizens Alert Regarding the Env't v. Leavitt, 355 F. Supp. 2d 366, 372-73 (D.D.C. 2005); Judicial Watch, Inc. v. FEC, 293 F. Supp. 2d 41, 48-49 (D.D.C. 2003); Sadowski v. Bush, 293 F. Supp. 2d 15, 20-21 (D.D.C. 2003); Mahorner v. Bush, 224 F. Supp. 2d 48, 54 (D.D.C. 2002); Palm v. Paige, 161 F. Supp. 2d 26, 33 (D.D.C. 2001). Particularly when the lack of standing is closely related to the failure to state a claim, the dismissal may be with prejudice if there is no basis to amend the complaint to allege standing.

3. Many of the cases cited by Plaintiffs involve instances in which the plaintiff could take some action to cure the defect upon which the dismissal relied, see Simpkins v. Dist. of Columbia Gov't, 108 F.3d 366, 371 (D.C. Cir. 1997) (failure to exhaust mandatory

administrative remedies); Nat'l Conf. of Catholic Bishops v. Smith, 653 F.2d 535, 543-44 (D.C. Cir. 1981) (ripeness); Arrowsmith v. United Press Int'l, 320 F.2d 219, 221 (2d Cir. 1963) (improper venue and lack of personal jurisdiction); Stanley v. CIA, 639 F.2d 1146, 1159-60 (5th Cir. 1981) (lack of a waiver of sovereign immunity when the court believed amendment was possible).

4. Plaintiffs cite no case that is akin to the circumstances presented here, where the Court has concluded that one of the defendants is not subject to suit for monetary relief and dismissed the claims against him for lack of Article III standing. Nor do Plaintiffs state that they wish to amend to their Complaint or that they could allege facts that would cure the standing defect.

5. Finally, the D.C. Circuit has made it clear that dismissals for lack of standing are res judicata in other cases as to the jurisdictional question. See Coll. Sports Council v. Dep't of Educ., 465 F.3d 20, 22-23 (D.C. Cir. 2006); Kasap v. Folger Nolan Fleming & Douglas, Inc., 166 F.3d 1243, 1248 (D.C. Cir. 1999); Dozier v. Ford Motor Co., 702 F.2d 1189, 1191 (D.C. Cir. 1983). There is thus no dispute that the Court's holding that Plaintiffs do not have standing to sue Secretary Kempthorne under these facts is res judicata should Plaintiffs attempt to sue the Secretary again on the same facts.

6. The Court's decision thus appears to be final and will be appealable when the Court enters a final judgment in the case. For all of these reasons, the dismissal should be clarified as one "with prejudice."

For the foregoing reasons and those set forth in Defendants' Motion for Clarification of the Court's Opinion and Order of September 22, 2008, Defendants' Motion should be granted,

and the dismissal of the monetary claims Secretary Kempthorne should be clarified as “with prejudice.”

Respectfully submitted,

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