IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CITY OF CINCINNATI, Plaintiff, v. UNITED STATES OF AMERICA and SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	Case No. C1–03-731 Senior Judge Herman J. Weber

UNITED STATES' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

INTRODUCTION

Plaintiff, City of Cincinnati ("City"), has moved for leave to file an amended complaint against the United States for past and future "storm drainage service charges."[1] See Motion for Leave to File Amended Complaint and Memorandum in Support ("Pl. Motion"). The Court should deny the City's motion because amendment of the complaint is futile. As shown below, amendment of the complaint is futile because the City fails to allege a sufficient basis for subject matter jurisdiction. Leave to amend should also be denied in light the City's unexplained failure to assert its new quantum meruit claim against the United States until now. Whatever quantum meruit claim the City now possesses, it also possessed in 1996, when it brought its first lawsuit to recover these same sewer fees from the Secretary of the Department of Health & Human

[1] Because the United States answered the City's initial complaint, see Dkt. No. 10, the City must obtain leave to file its proposed amendment. Fed. R. Civ. P. 15(a).

Services ("HHS"), in the U.S. Court of Federal Claims ("CFC"). The rule against claim splitting and the public interest against serial litigation of new legal theories militate against yet another round of pleadings. The Court should deny the City's motion to amend and rule on the parties' pending motions for judgment on the pleadings and summary judgment.

ARGUMENT

1. The City's Proposed Complaint Fails To State A Basis For Subject Matter Jurisdiction Over Its Claims Against The United States.

A motion for leave to amend a complaint "should be denied if the amendment is brought . . . for dilatory purposes, results in undue delay or prejudice . . . or would be futile." Crawford v. Roane, 53 F.3d 750, 753 (6th Cir. 1995). In the context of motions to amend, "futility" exists where a proposed amendment would not survive a motion to dismiss under Rule 12(b)(6). Rose v. Hartford Underwriters Ins. Co., 203 F.3d 417, 420 (6th Cir. 2000); Thiokol Corp. v. Dep't of Treasury, State of Michigan, Revenue Div., 987 F.2d 376, 382 (6th Cir. 1993). Just such a situation exists here.

The City purports to base the Court's subject matter jurisdiction over the case upon the federal question statute (28 U.S.C. § 1331), the Declaratory Judgment Act (28 U.S.C. § 2201) and section 2 (the "Case or Controversy" prong) of Article III of the U.S. Constitution. See Proposed Complaint ¶ 5. These provisions alone, however, do not serve as an adequate basis for federal subject matter jurisdiction, either on their own or in combination. The Declaratory Judgment Act expands the range of remedies available in federal cases where the Court otherwise has subject matter jurisdiction over a claim for relief; it does not extend subject matter jurisdiction which does not otherwise exist. See Skelly Oil v. Phillips Petroleum, 339 U.S. 667, 671-72 (1950). Similarly, Article III of the Constitution – which gives courts power to hear

cases "arising under" federal statutes, see Art. III, § 2 – is not self-executing and requires a separate statute, such as the federal question statute, to give it effect. See Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 807 (1986).

As for the federal question statute itself, the operative phrase in that statute – giving district courts original jurisdiction over "all civil actions *arising under* the Constitution [or] laws . . . of the United States" – is interpreted in the same manner as the corresponding phrase in the Tucker Act, i.e., "[a]ny claim against the United States *founded* either *upon* the Constitution or any Act of Congress . . . ." Compare 28 U.S.C. § 1331 (emphasis added) & 28 U.S.C. § 1491(a)(1) (emphasis added); see also Christie-Street Commission Co. v United States, 136 F. 326, 331 (8th Cir. 1905); Clapp v. United States, 117 F. Supp. 576, 578 (Ct. Cl. 1954).[2] In either case, "[a] claim is both founded upon, and it arises under, a provision of a Constitution or of a law which conditions and determines its validity . . . ." Christie, 136 F. at 331.

As the United States previously clearly demonstrated, in connection with its earlier motion for judgment on the pleadings, the City's claim does not arise under a provision of the U.S. Constitution or federal law. Rather, it arises under and is founded upon state and/or local law – specifically, the City's Stormwater Management Code and the Ohio Constitution. See United States Reply Memorandum in Support of its Motion for Judgment on the Pleadings or, Alternatively, for Summary Judgment, Dkt. No. 19, at 6. As the City acknowledges in its proposed complaint, it is state and/or local law – not federal law – which assigns a "storm

[2] As the Supreme Court has held, "[t]he argument that there is a distinction between claims 'arising under' . . . and those 'founded upon' a law of the United States rests on [an] inadmissible premise[.]" United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 32 (1915).

drainage service charge" to real property in the City and requires that a "user fee" be paid "by the property owner benefitting from the stormwater utility service." See Proposed Complaint ¶¶ 8-10. Federal law does not create or impose this obligation or requirement on a user or property owner.

As the City's motion and proposed amended complaint make clear, the only alleged "hook" to federal law contained in this case is the "waiver of sovereign immunity" provision in Clean Water Act section 313, 33 U.S.C. § 1323. Pl. Motion, at 1-2. However, the scope of the waiver of immunity under CWA section 313 is relevant in this case only as a defense to liability; the waiver itself does not contain any substantive standards of conduct with which the United States must comply. See Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475 (1998) ("a defense is not part of a plaintiff's properly pleaded statement of his or her claim").

As the Sixth Circuit has found:

> Whether a case is one arising under [federal law], in the sense of the jurisdictional statute . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim . . . unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.

B & B Trucking, Inc. v. USPS, 363 F.3d 404, 418 (6th Cir. 2004) (emphasis added). "A suit arises under the law that creates . . . the action." American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (Holmes, J.). Accordingly, federal question jurisdiction cannot be founded "on the basis of a federal defense . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 14 (1983).

The allegations in the City's proposed complaint – like its prior complaint – make clear that its present claim is one "arising under" and "founded upon" state and/or local law, not federal law. The City's proposed complaint would not survive a motion to dismiss. The City's attempt to amend its complaint is futile and, accordingly, the City's motion should be denied.

2. The City's Proposed Complaint Is Based Upon The Same Facts Considered And Rejected By The Court Of Claims And The Federal Circuit And, Thus, Its Claim Is Barred.

The City's motion also fails for a second fundamental reason: the City's proffered complaint is based on the same laws and transactional facts underlying both its 1996 action and the original complaint in this case. No new substantive factual allegations are contained in the City's latest version of its pleadings and, thus, its motion to amend should be denied as futile. See Frank v. D'Ambrosi, 4 F.3d 1378, 1386 (6th Cir. 1993) (leave to amend is futile when amended complaint fails to include new allegations). For purposes of *res judicata*, the City's proposed complaint and its prior ones constitute one and the same claim; the rule against "claim splitting" bars the City's belated attempt to recover from the United States, under a new quantum meruit legal theory, at this late date.

As the Federal Circuit has stressed:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions, out of which the action arose.

Foster v. Hallco Manuf. Co., 947 F.2d 469, 478 (Fed. Cir. 1991) (quoting Restatement (Second) of Judgments § 24) (emphasis added). "That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence

multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts[.]" Nilsen v. City of Moss Point, 701 F.2d 556, 560 (5th Cir. 1983) (quoting Restatement (Second) of Judgments § 24 comment c) (emphasis added). "[A] 'claim' rests on a particular factual transaction or series thereof on which a suit is brought." Foster, 947 F.2d at 479.

It is clear from the City's proposed amended complaint that it rests upon the same "factual transaction or series thereof" at issue in 1996, when the City first filed its claim, as well as the same series of transactions which are the basis for its original complaint in this Court. Significantly, the City has long known that it possessed at least a *potential* claim against HHS, based on principles of quantum meruit: as the attachment to its proposed amended complaint shows, in 1992 – six years before the City's original action against HHS was filed in the CFC – the City was advised by HHS that it should pursue any storm drainage service charges for which it sought payment "on a quantum meruit theory[.]" See Proposed Complaint, Attach. Had it wanted to, the City could have asserted a quantum meruit theory (i.e., one for services rendered based on the existence of an alleged implied-in-law contract, see Murray Hill Publications, Inc. v. ABC Communications, Inc., 264 F.3d 622, 637-38 (6th Cir. 2001)) at that time.[3] It also could have initiated a state court action against HHS, based on the City's Stormwater Management Code and the sovereign immunity waiver provision of Clean Water Act section 313. It did neither. Instead, it filed its claim in the CFC, using a *different* contract theory – arguing the

[3] For purposes of this response, the United States need not, and does not, concede that in 1992 and 1996 the City possessed a valid quantum meruit claim against HHS relating to the City's alleged storm drainage service charges.

existence of an implied-in-fact contract – and it lost. Cincinnati v. United States, 39 Fed. Cl. 271, 276 (Fed. Cl. 1997), aff'd in pertinent part, 153 F.3d 1375 (Fed. Cir. 1998).

The rule against claim splitting "is grounded in a policy of encouraging litigants to raise all claims arising out of one transaction in a single suit[.]" City of Moss Point, 701 F.2d at 562. It is true that a plaintiff's claims may be preserved following an initial judgment "where the court itself, rather than the litigant, does the splitting and does it by reason of no default on the part of the litigant . . . ." Id. at 563. Here, however, the City's new quantum meruit "claim" is one it elected not to bring in an appropriate forum ten years ago, when it had the chance. "The system

. . . was, in and of its nature, ready and able to accommodate all such claims, if timely made[.]" Id. For reasons best known to the City, it elected not to present its current legal theory until now.

"The doctrine of *res judicata* contemplates, at a minimum, that courts be not required to adjudicate, nor defendants to address, successive actions arising out of the same transaction, asserting breach of the same duty." City of Moss Point, 701 F.2d at 563. Res judicata "is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace[.]'" Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917) (internal citation omitted).

Whether cast as a federal statutory claim under the Tucker Act, a state law claim, or (as the City would now have it) one for quantum meruit, the City has had its day in court on its claim for "reasonable service charges" against the United States. The City was dilatory in electing to pursue its claim under its current quantum meruit theory, and the City's delay

prejudices HHS by dragging it back into Court again, years later, on the very same claim for relief. See Foman v. Davis, 371 U.S. 178, 182 (1962) (recognizing undue delay as a legitimate ground for denying a party's motion to amend); Morse v. McWhorter, 290 F.3d 795, 799 (6th Cir. 2002) (same).[4]

CONCLUSION

For the foregoing reasons, the Court should deny the City's motion to amend its complaint and rule on the parties' pending motions based on the City's original complaint.

Respectfully submitted,

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Date: May 28, 2004

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[4] The City has advised the Court that it wishes to "substitute the amended complaint as the basis for" its pending summary judgment motion and has indicated that it "has no objection to allowing additional time for the [United States] to respond." Plaintiff's Response to Defendant's Memorandum in Opposition to City's Motion for Summary Judgment at 1. Should the City's motion to amend its complaint be granted, the United States requests that it be given an appropriate period of time (i.e., 45 days) to answer the complaint, respond to the City's motion for summary judgment and prepare its own cross-motion for judgment on the pleadings.

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CERTIFICATE OF SERVICE

I certify that on this 28th day of May 2004, I electronically filed the foregoing United States' Memorandum in Opposition to Plaintiff's Motion for Leave to File Amended Complaint with the Clerk of the Court using the CMF/ECF system that will send notification of such filing to Richard Ganulin, counsel for the Plaintiff, City of Cincinnati.

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