

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
Greenbelt Division**

THE DISTRICT OF COLUMBIA and  
THE STATE OF MARYLAND,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States of America,

*Defendant.*

Civil Action No. 8:17-cv-01596-PJM

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT AND TO  
APPLY THE PENDING MOTION TO DISMISS [DOC. 21] TO THE AMENDED  
COMPLAINT**

The District of Columbia and the State of Maryland hereby move to amend their complaint to name Donald J. Trump as a defendant in his individual capacity.<sup>1</sup> In all other respects, the amended complaint is identical to the original complaint. This Court should grant the motion because it is brought in good faith, will not prejudice President Trump, and is not futile. Plaintiffs further respectfully request that the Court exercise its discretion to permit the amendment and apply the pending motion to dismiss the official capacity claims to the amended complaint, thereby minimizing delay and conserving judicial resources.

**A. This Court should grant leave to amend because the motion is brought in good faith, will not prejudice President Trump, and is not futile.**

Rule 15 provides that leave to amend “shall be freely given,” Fed R. Civ. P. 15(a)(2), to allow the plaintiff “every opportunity to cure a formal defect in his pleading,” *Laber v. Harvey*,

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<sup>1</sup> In this memorandum, Plaintiffs use the honorific “President” or “President Trump” to refer to Donald J. Trump in his official capacity and his individual capacity. Where relevant, the memorandum notes the capacity in which the President is being sued.

438 F.3d 404, 426 (4th Cir. 2006) (en banc) (quotation marks omitted). Under this rule, “leave should be denied *only* when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile.” *Franks v. Ross*, 313 F.3d 184, 193 (4th Cir. 2002) (quotation marks omitted). None of these three exceptions applies here.

*First*, this motion is brought in good faith. Indeed, it was prompted by the Court’s questioning at oral argument. *See, e.g.*, Tr. of Mot. Proceedings 44:21–24, 46:2-5, 97:17-25, 170:18-171:5. (D. Md. Jan 25, 2018). Plaintiffs continue to believe that suing the President for violating these Clauses in his official capacity is proper and reflects “the reality that the defendant’s conduct is illegal by virtue of the fact that he is President.” Br. of Scholars as Amici Curiae, ECF No. 56-1 at 18; *see Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949) (explaining that an action may be brought against a federal official acting “beyond the officer’s powers” without necessarily being considered an action against the United States); *Pollack v. Hogan*, 703 F.3d 117, 119–21 (D.C. Cir. 2012) (applying *Larson* in suit for declaratory and injunctive relief alleging unconstitutional acts by the director of federal agency, sued in his official capacity, and holding that suit was not against the United States); *see also Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir. 1989) (explaining that “[a]n action seeking specific relief against a federal official” is “an action against the United States” if officer was “acting within the scope of his delegated authority”). However, Plaintiffs also acknowledge that this suit raises issues of first impression. Out of an abundance of caution, the plaintiffs therefore seek to amend their complaint to facilitate full review of their claims, both in this Court and in any future appeals. *See* Tr. 170:21–171:5.

*Second*, President Trump is not prejudiced by this amendment. The amended complaint states no new claims or allegations against him in his official capacity, and he has already fully exercised his right to respond to the unchanged allegations through the pending motion to dismiss. The President in his official capacity therefore has suffered no “lost opportunity” to respond to the identical allegations in the amended complaint. *See* 1 Steven S. Gensler, *Federal Rules of Civil Procedure, Rules and Commentary* Rule 15 (“Historically, prejudice under Rule 15(a) has been equated with lost opportunity.”); *see also* *Laber*, 438 F.3d at 427 (explaining that “an amendment is not prejudicial,” even if it “adds an additional theory to the facts already pled,” when “offered before any discovery has occurred”).

*Third*, the amendment is not futile because it is not “clearly insufficient or frivolous on its face.” *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 511 (4th Cir. 1986). As this Court noted multiple times at oral argument, there are genuine issues regarding the best capacity or capacities in which to bring this case. *See* Tr. 26:5–6, 33:16–19, 73:18–19. The proposed amendment will allow the Court to decide the case “on the basis of the substantive rights involved rather than on technicalities.” *Laber*, 438 F.3d at 426.

**B. This Court should apply the pending motion to dismiss the official capacity claims to the amended complaint, thereby minimizing delay and conserving judicial resources.**

The Court and the parties have already invested a substantial amount of time in this case on the basis of the plaintiffs’ existing complaint. The motion to dismiss that complaint has received extensive briefing by the parties and their *amici* and was the subject of a day-long hearing. The Court should therefore exercise its discretion to apply the pending motion to dismiss the official capacity claims to the amended complaint. *See Rock for Life-UMBC v. Hrabowski*, 594 F. Supp. 2d 598, 601 n.1 (D. Md. 2009) (granting motion to amend and treating a pending dispositive

motion as directed to the amended complaint, which added defendants but raised “no new theories or claims for relief” against any original defendant).

To be sure, the “general rule” is that “an amended pleading ordinarily supersedes the original and renders it of no legal effect.” *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001). But a preexisting motion to dismiss “is not automatically rendered moot” by an amended complaint. *Savage v. Centex/Taylor, LLC*, 2012 WL 946698, at \*4 (D. Md. 2012). To the contrary, “[a] court . . . has a variety of ways in which it may deal with the pending motion, from denying the motion as moot to considering the merits of the motion in light of the amended complaint.” *In re Colonial Ltd. P’ship Litig.*, 854 F. Supp. 64, 80 (D. Conn. 1994). Applying a preexisting dispositive motion to a later-filed amended complaint is not at all uncommon. *See, e.g., Metsack v. Liberty Mut. Fire Ins. Co.*, 2015 WL 5797016, at \*4 (D. Conn. 2015); *Saye v. First Specialty Ins. Co.*, 2015 WL 1737949, at \*3 (E.D.N.Y. 2015); *Howard v. John Moore, L.P.*, 2014 WL 5090626, at \*1 (S.D. Tex. 2014); *Ellipso, Inc. v. Mann*, 460 F. Supp. 2d 99, 103 (D.D.C. 2006); *see also* Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1476 (3d ed. 2010) (explaining that if the new pleading raises some of the same objections as were “raised in the original motion . . . , the court simply may consider the motion as being addressed to the amended pleading”).

The *Metsack* and *Saye* cases, in particular, are instructive. In each of those cases, the plaintiffs filed an amended complaint that added a new defendant when the original defendant’s motion to dismiss was pending. *See Metsack*, 2015 WL 5797016, at \*4; *Saye*, 2015 WL 1737949, at \*1. Because “the issues presented by [the motions to dismiss] . . . and the factual allegations relevant to those issues [had] not changed,” the courts each applied the pending motions to dismiss to the unchanged allegations in the amended complaint. *Metsack*, 2015 WL 5797016, at \*4; *see*

*also Saye*, 2015 WL 1737949, at \*3 (“Here, the Amended Complaint restates the same claims against [the first defendant] that [the plaintiff] alleged in the original complaint; it essentially serves only to add [a second defendant] as a party to the suit. As such, I elect to consider the merits of [the first defendant]’s motion in light of the Amended Complaint.”).

That is the right course here. The amended complaint adds no factual allegations or legal claims against the President in his official capacity. Instead, it simply adds a new defendant—the President in his individual capacity. Applying the pending motion to dismiss the official capacity claims to the amended complaint, rather than requiring the parties to re-brief the motion to dismiss on the official capacity claims and starting everything over from scratch, will avoid both prejudice and waste. As to prejudice, there is none. Because the amended complaint is “substantially identical to the original complaint,” *Greater Cincinnati Coal. for Homeless v. City of Cincinnati*, 2009 WL 3029661, at \*4 (S.D. Ohio 2009), applying the pending motion to dismiss to the identical official capacity claim in the amended complaint will do nothing to inhibit “preparation of [the President’s] defense,” *Rock for Life-UMBC*, 594 F. Supp.2d at 601 n.1. And such an approach is also more efficient. “It would waste both the court’s and the parties’ resources to deny the motion and require defendants to file an identical motion directed to the first amended complaint.” *Shame on You Prods., Inc. v. Elizabeth Banks*, 120 F. Supp. 3d 1123, 1140 (C.D. Cal. 2015).

In sum, construing the motion to dismiss as applying to the official capacity claims contained in the amended complaint would help “to secure the just, speedy, and inexpensive determination” of this action. Fed. R. Civ. P. 1. Indeed, the suggested procedure will allow the Court to resolve both the official capacity and individual capacity claims as expeditiously as possible while simultaneously preserving all parties’ rights.

**CONCLUSION**

Maryland and the District respectfully request that the Court grant leave to amend the complaint and order that the amended complaint be filed in this action in the form attached to their motion. Maryland and the District also respectfully request that the Court apply the pending motion to dismiss the official capacity claims to the amended complaint.

Dated: February 23, 2018

Respectfully submitted,

THE DISTRICT OF COLUMBIA

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