UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:18-cv-05774-AT
	)	
NANCY ZAK, CLAUD CLARK III, ECOVEST CAPITAL, INC., ALAN N. SOLON, ROBERT M. MCCULLOUGH, RALPH R. TEAL JR.,	)	
	)	
Defendants.	)	

MOTION FOR LEAVE TO AMEND COMPLAINT

Since the filing of the original complaint on December 18, 2018, the United States has discovered additional information about Defendants' conservation easement syndication scheme – specifically the breadth of the scheme, how widespread Defendants' conduct is, and the harm caused by Defendants' conduct. Upon reviewing and evaluating this information in light of the internal revenue laws, and in the interests of justice, the United States moves to amend its complaint pursuant to Fed. R. Civ. P. 15(a)(2). The United States' proposed amended complaint is attached as Exhibit A.

The United States' motion should be granted because of Rule 15(a)'s liberal policy of granting leave to amend unless substantial reason exists to deny it. Because the motion is timely,[1] the amendments are the result of diligent effort by counsel for the United States, and the Defendants will not be unduly prejudiced by the proposed amended complaint, the Court should grant this motion. Additionally, the United States intends to file a request for relief from the current discovery limitations based on the allegations in the amended complaint which show that the promotion of this scheme is even more widespread (i.e., 37 broker-dealers and over 185 frontline sellers located in at least 33 different states) than previously alleged.

I. THE UNITED STATES SHOULD BE GRANTED LEAVE TO FILE AN AMENDED COMPLAINT.

Under Fed. R. Civ. P. 15(a)(2), a party may amend its complaint with leave of the court. "When determining whether leave should be granted to allow an amendment, Federal Rule of Civil Procedure 15(a) provides that the court 'should

[1] The Court has not yet issued a scheduling order in this case and, accordingly, there is no current deadline for amendments to pleadings. The United States notes that in the parties' most recent joint filing about scheduling issues, the United States proposed April 16, 2020 as the date to amend the pleadings. (ECF No.146). As discussed further, *infra*, the United States has diligently sought to meet this deadline even though its attorneys have been hampered by the COVID-19 public health crisis.

freely give' leave to amend 'when justice so requires.'" *Sky Harbor Atlanta Ne., LLC v. Affiliated FM Ins. Co.*, 2019 WL 7944234, at *2 (N.D. Ga. 2019); *see also*, *IST Mgmt. Servs., Inc. v. Hamel*, 2019 WL 7819474, at *4 (N.D. Ga. 2019). "The court should deny leave to amend only where the amendment will result in undue delay, bad faith, undue prejudice, a repeated failure to cure deficiencies by amendments previously allowed, or futility." *Robinson v. Sacramento Hotel Partners*, 2019 WL 2084538 at *5 (N.D. Ga. 2019) (citing *Foman v. Davis*, 371 U.S. 1878, 182 (1962)). Here, the interests of justice would be served by granting leave *and* there is no substantial reason to deny it. *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (courts generally grant leave to amend unless there is *substantial* reason to deny it) (emphasis added).

A. The interests of justice are served by granting the United States' motion and permitting the filing of the amended complaint.

Motions for leave to amend are routinely granted when the basis for doing so is to amplify or enhance allegations in the original complaint – such reasons can serve the interests of justice, like they would in this case. *See, e.g., Counsel on American-Islamic Relations Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311 (D.D.C. 2011) (appropriate to grant leave to add allegations to complaint designed to "flesh out" the factual basis for claims already asserted in action; the allegations merely fine-tuned the basis for relief sought by the organization); *Clark v. Feder*

Semo & Bard, P.C., 560 F. Supp. 2d 1, at *4 (D.D.C. 2008) (when an amendment would do no more than clarify legal theories or make technical corrections, without a showing of prejudice, delay is not sufficient ground for denying the motion); *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1010 (N.D.N.Y. 1980) (interests of justice served by allowing amended complaint that merely elaborated on its original claims and defendant would not be prejudiced or surprised by the additional allegations as defendant admitted to being familiar with the assertions made in the proposed amended complaint).

The proposed amended complaint primarily seeks to further expound about the full breadth and scope of Defendants' conduct from 2009 to present in organizing, promoting, and selling the conservation easement syndication scheme. For example, the proposed amended complaint identifies 138 syndicate deals organized, promoted, and sold by Defendants – 42 more than the syndicates identified in the original complaint, an increase of approximately 44%. This includes syndicates with real property located in the eight states previously identified in the original complaint and three additional states: California, Florida, and Louisiana. The proposed amended complaint also contains additional detail about how Defendants operated their scheme. For example, the EcoVest Defendants used 37 broker-dealers and over 185 front-line sellers in 33 different

states to offer their syndicates to customers in those states and others. The proposed amended complaint provides details about the average or typical fees earned by Defendants in this scheme: approximately $100,000 to $200,000 of consulting fees per deal by Zak, over $43,000 per conservation easement appraisal by Clark, and approximately $3 million in various fees by EcoVest and its affiliates per deal. The proposed amended complaint and the amplified allegations contained therein assist all parties and the Court in understanding the factual basis for the United States' claims. As such, the interests of justice are served by granting the United States' motion and permitting the filing of the proposed amended complaint.

B. There is no substantial reason to deny the United States' Motion.

Here, the proposed amended complaint will not result in undue delay or undue prejudice, and because amendment would not be futile, there is no substantial reason to deny the United States' motion. First, this motion is timely. As noted above, there is no current deadline to amend pleadings. Although some time has passed since the filing of the original complaint, this motion is still timely

as discovery is underway and will remain open for at least four more months.[2] The amplified allegations in the amended complaint stem from discovery conducted in this case – mostly drawn from Defendants' own documents or testimony, and discovery obtained from their subpromoters. Because the amplified allegations elaborate on the United States' claims, they do not frustrate the discovery that has already occurred. As such, this motion is timely. *See, e.g., Morrison v. Ocwen Loan Servicing*, 2019 WL 2323589, at *2 (N.D. Ga. 2019) (granting leave to amend where case was "still in its infancy with neither party having expended time, energy or financial resources on discovery only to have those efforts frustrated by an untimely motion to amend[;]" while "a seven month delay is not insignificant," it was not a substantial reason to deny motion to amend) (citing *Howard v. Mortg. Elec. Registration Sys., Inc.*, 2011 WL 13214376, at *2 (N.D. Ga. 2011)).

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[2] The parties submitted conflicting proposed schedules and the Court has taken those under advisement. However, the Court's prior order, which provides for an eighth-month discovery window (ECF Nos. 86, 119), coupled with the additional 30 days for discovery in all civil cases in this Court due to the COVID-19 public health crisis (ECF No. 166), means that the earliest discovery could close would be September 10, 2020. The COVID-19 public health crisis is currently impacting the parties' ability to travel and conduct many categories of discovery (i.e., site visits, depositions) and will require the United States to seek additional time for discovery at the appropriate time.

Second, there is no undue prejudice to the opposing parties. As discussed above, the proposed amended complaint amplifies the factual allegations in the original complaint especially with respect to the breadth and extent of Defendants' conduct. The proposed amended complaint details how widespread and pervasive the Defendants' scheme truly is, and provides significant more detail on the Defendants' nationwide, sophisticated marketing strategy. In alleging Defendants' selling network consists of at least 37 broker-dealers and 185 frontline sellers located in at least 33 different states, the proposed amended complaint shows how Defendants' deals were marketed and provides specific statements made by the frontline sellers. The allegations also explain how Defendants inserted themselves into the sales process by providing training and attending meetings with the front-line sellers, and at times, their clients. The proposed amended complaint also details how Defendants used service providers from all over the country, including Illinois, Minnesota, Missouri, and Nebraska – despite not organizing syndicates with real property in those states. Defendant's scheme is nationwide as the proposed amended complaint evidences.

There simply is no prejudice to Defendants from providing additional allegations about their own conduct with which they are obviously already intimately familiar. This is especially true when much of the information

supporting the newly-added allegations is drawn from Defendants' own documents and testimony, and discovery obtained from their subpromoters.

Finally, amendment is not futile. The proposed amended complaint meets the pleading standards under the Federal Rules and provides ample notice to Defendants about the United States' claims and the relief sought. Indeed, all but one count of the original complaint survived the Defendants' motions to dismiss, and the United States has removed that count (which was dismissed without prejudice) from the proposed amended complaint.[3] Moreover, the factor regarding futility is most applicable when a party is repleading to meet deficiencies identified in a motion to dismiss, which is not the case here. Nor is the United States adding counts or parties to the original complaint which obviates the futility factor in toto.

II. CONCLUSION

Rule 15(a)'s liberal policy weighs in favor of granting the United States' motion as there is no substantial reason to deny it. The motion is timely, filed in

[3] The United States reserves it right to appeal the dismissal of Count II as to Ms. Zak despite not repleading it. *See, Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1191 n.5 (11th Cir. 1999); *Perry v. Schumacher Group of Louisiana*, 2020 WL 1686260, at *4 n.4 (11th Cir. Apr. 7, 2020).

good faith, and without a dilatory motive. As such, this Court should freely grant the United States' motion and grant leave to amend its complaint.

Dated: May 8, 2020

Respectfully submitted,

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*I certify that this motion has been prepared with one of the font and point selections approved by the court in LR 5.1C.