

Management Group (“Federated” and, together with Prestige, the “Prestige Enterprise”), and Kenneth Wayne Lee (“Lee”), Plaintiffs’ filing of the proposed First Amended Complaint is timely pursuant FRCP 15(a)(1)(B) since none of those defendants has filed a responsive pleading. With respect to defendant Simon Yang (“Yang”), leave to amend should be granted freely in the interest of justice pursuant to FRCP 15(a)(2).

PROCEDURAL HISTORY

On November 20, 2009, Plaintiffs filed a Complaint for Injunctive and Other Equitable Relief and for Civil Penalties Under the Commodity Exchange Act and the Oklahoma Uniform Securities Act (“Complaint”) against defendants alleging that, from at least July 2003 to the present, through their fraudulent solicitations, misappropriation, false statements, and misrepresentations to the Commission, defendants violated several of the anti-fraud provisions of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.* (2006) (“Act”), the Regulations promulgated under it, 17 C.F.R. 1.1, *et seq.* (2009), and the Oklahoma Uniform Securities Act of 2004, Okla. Stat. tit. 71, §§1-101 – 1-701 (Supp. 2004) (“OUSA”).

On November 20, 2009, this Court entered its *Ex Parte* Statutory Restraining Order, Appointment of Temporary Receiver, Expedited Discovery, Accounting, Order to Show Cause re Preliminary Injunction, and Other Equitable Relief (“SRO”) against defendants. The SRO, among other things, granted Plaintiffs and the Receiver the right to take discovery on an expedited basis.¹

¹ On December 2, 2009, the Court entered Consent Orders of Preliminary Injunction against Lee and Yang (“Consent Preliminary Injunctions”). The Consent Preliminary Injunctions enjoin Lee and Yang from further violations of the Act and the OUSA, and continue the SRO in full force and effect until further order of the Court.

On December 14, 2009, Yang filed his answer to the Complaint. None of Lee, Prestige or Federated has filed a responsive pleading. A clerk's entry of default has been entered against Lee.

STATEMENT OF RELEVANT FACTS

As detailed more fully in Plaintiffs' Motion and Brief in Support to Amend the SRO filed concurrently herewith, through discovery taken since the filing of the Complaint, Plaintiffs have learned that Lee and the Prestige Enterprise diverted over \$2 million of the ill-gotten gains Defendants obtained from their fraudulent acts to the Relief Defendants in the form of real estate, cars, boats, cash, gifts, and expenses. Plaintiffs also have learned that none of the Relief Defendants provided legitimate services to the Prestige Enterprise or its pool participants, and otherwise have no legitimate entitlement to or interest in the Prestige Enterprise's pool participant funds.

ARGUMENT

Plaintiffs seek to amend the Complaint to add Sheila, Darren, and David Lee as relief defendants. FRCP 15 provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave." *Id.* at 15(a)(2). Leave to amend a complaint should be freely given when justice so requires. FRCP 15(a)(2); *see also York v. Cherry Creek Sch. Dist. No. 5*, 232 F.R.D. 648, 649 (D .Colo.2005); *Aspen Orthopaedics & Sports Medicine, LLC v. Aspen Valley Hosp. Dist.*, 353 F.3d 832, 842 (10th Cir.2003). "Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Frank*

v. U.S. West, Inc., 3 F.3d 1357, 1365 (10th Cir.1993); see also *Duncan v. Manager, Dep't of Safety, City, and County of Denver*, 397 F.3d 1300, 1315 (10th Cir.2005).

Here, leave should be “freely granted” to file the First Amended Complaint because there is no justification for denial. The filing of the First Amended Complaint is not due to any “undue delay” inasmuch as discovery is in its infancy. Defendants and Relief Defendants are not unfairly affected since there is no scheduling or trial order in place and, thus, Defendants’ and Relief Defendants’ ability to respond to the First Amended Complaint in a timely manner is not hindered. The filing is not in bad faith, but instead due to new evidence Plaintiffs uncovered during the expedited discovery phase. The First Amended Complaint, which adds Sheila, David, and Darren Lee as Relief Defendants and seeks new relief in the form of an order of disgorgement against the Relief Defendants, is not futile. As stated above, the Relief Defendants have received over \$2 million in ill-gotten gains from Defendants’ fraudulent conduct without providing legitimate services to the Prestige Enterprise or its pool participants.

In the First Amended Complaint, Plaintiffs do not make allegations that Relief Defendants have violated the Act or the OUSA, but add the Relief Defendants as a means of facilitating collection of funds in which Relief Defendants have no rightful interest. The only relief Plaintiffs seek against Relief Defendants is an order of disgorgement against them. In an enforcement proceeding brought by the Commission, the Court’s jurisdiction under 7 U.S.C. §13a-1 (2006) includes equitable remedies such as restitution and disgorgement. *CFTC v. Wilshire Investment Mgmt. Corp.*, 531 F.3d 1339, 1343-44 (11th Cir. 2008). One such equitable remedy is the ordering of disgorgement from a

relief defendant. *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 191-92 (4th Cir. 2002); *SEC v. George*, 426 F.3d 786, 798 (6th Cir. 2005).

CONCLUSION AND RELIEF REQUESTED

The Defendants in this case have caused substantial injury to the Prestige Enterprise pool participants through their violations of the Act and the OUSA and the proposed Relief Defendants received unjust enrichment from Defendants' acts. Plaintiffs respectfully request that the Motion in the form of Proposed Order filed herewith be granted and Plaintiffs be granted leave to file and serve the First Amended Complaint.

Dated: March 3, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 3, 2010, I caused one copy of Motion for Leave to File a First Amended Complaint for Injunctive and Other Equitable Relief and for Civil Penalties Under the Commodity Exchange Act and the Oklahoma Uniform Securities Act and exhibits to be served by Federal Express on:

Simon Yang
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Kenneth Wayne Lee
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Mt. Pleasant, SC 29466

and to be served by Certified Mail/Restricted Delivery/Return Receipt on the following:

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