

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA**

**U.S. COMMODITY FUTURES
TRADING COMMISSION and
OKLAHOMA DEPARTMENT OF
SECURITIES *ex rel.* IRVING L.
FAUGHT,**

Plaintiffs,

v.

Civil Action No. 09-CV-1284 (DLR)

**PRESTIGE VENTURES CORP., a
Panamanian corporation, FEDERATED
MANAGEMENT GROUP, INC., a Texas
corporation, KENNETH WAYNE LEE,
an individual, and SIMON YANG (a/k/a
XIAO YANG a/k/a SIMON CHEN), an
individual,**

Defendants, and

**SHEILA M. LEE, an individual, DAVID
A. LEE, an individual, and DARREN A.
LEE, an individual,**

Relief Defendants.

**PLAINTIFFS’ RESPONSE AND OBJECTION TO
RELIEF DEFENDANT DARREN LEE’S “REQUEST FOR DAMAGES”**

Plaintiffs, U.S. Commodity Futures Trading Commission (“Commission”) and Oklahoma Department of Securities *ex rel.* Irving L. Faught (together, “Plaintiffs”), respectfully submit this response and objection to Relief Defendant Darren Lee’s (“Lee”) Request for Damages (Doc. No. 112), filed September 13, 2010 (the “Pleading”).

Although titled “Request for Damages,” the content of the Pleading suggests that

it should initially be treated as a motion for leave to amend Lee's answer to Plaintiffs' First Amended Complaint for Injunctive and Other Equitable Relief and for Civil Monetary Penalties under the Commodity Exchange Act and the Oklahoma Uniform Securities Act, dated March 4, 2010 ("Amended Complaint")¹, because the requested relief is "that patience be maintained until Darren Lee, Sheila Lee, and David Lee² have the required requested documentation for damages claimed." Lee states he is awaiting the Commission's response to Lee's request for admissions, interrogatories and document request ("Discovery Request")³. Lee acknowledges there is a schedule to be followed but that only upon receipt of the Commission's answer to the Discovery will he be able to calculate damages, and thereafter be able to make a claim for damages.

However, Plaintiffs assert that ultimately the Pleading should be treated as a motion to amend the Court's Scheduling Order issued on June 24, 2010 (Doc. No. 92) ("Scheduling Order")⁴. The Scheduling Order required that motions to amend pleadings be filed by July 20, 2010. When a party files a document "where a party seeks to amend

¹ On November 20, 2009, Plaintiffs filed the original complaint, Complaint for Injunctive and Other Equitable Relief and for Civil Monetary Penalties under the Commodity Exchange Act and the Oklahoma Uniform Securities Act. The March 4, 2010 amended complaint added individuals Sheila, David, and Darren Lee as Relief Defendants.

² The Pleading requests relief on behalf of Darren, Sheila and David Lee but is only signed by Darren Lee.

³ The Commission was served with the Discovery Request on or about August 10, 2010, and served its response on September 9, 2010.

⁴ Lee participated in the Scheduling Conference held on June 24, 2010.

its pleadings [under Rule 15] after a deadline set by court order, the party is effectively asking the court both to amend the scheduling order and for leave to amend its pleadings” under Rule 16. *Hildebrand v. Dentsply Int’l, Inc.*, 264 F.R.D. 192, 197 (E.D. Pa. 2010); *Colorado Visionary Acad. v. Medtronic, Inc.*, 194 F.R.D. 684, 687 (D. Colo. 2000). If the movant passes Rule 16 scrutiny, the movant must also demonstrate that the amendment is proper under Rule 15(a). *Carnrite v. Granada Hosp. Group, Inc.*, 175 F.R.D. 439, 446 (W.D.N.Y. 1997).

OBJECTION TO SCHEDULING ORDER AMENDMENT

Lee’s motion to amend the Scheduling Order is without “good cause” and should be denied. The majority of circuits, including the Tenth Circuit, have ruled that the Rule 16(b) “good cause” standard, along with judicial consent, rather than the more liberal standard of Rule 15(a), governs a motion to amend that is filed after the deadline a district court has set to amend the pleadings. *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000); *Riofrio Anda v. Ralston Purina, Co.*, 959 F.2d 1149, 1154 (1st Cir. 1992); *Carnrite*, 175 F.R.D. at 446; *Cordance Corp. v. Amazon.com, Inc.*, 255 F.R.D. 366, 371 (D. Del. 2009); *In re Milk Products Antitrust Litig.*, 195 F.3d 430, 437 (8th Cir. 1999); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992); *Bylin v. Billings*, 568 F.3d 1224, 1231 n.8 (10th Cir. 2009) *cert. denied*, 130 S. Ct. 1506 (U.S. 2010); *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998) (per curiam). As the court in *Sosa* explained, if “we considered only Rule 15(a) without regard to Rule 16(b), we would render scheduling orders meaningless and effectively would

read Rule 16(b) and its good cause requirement out of the Federal Rules of Civil Procedure.” 133 F.3d at 1419.

The “good cause” element requires the movant to demonstrate that, despite diligence, the proposed claims could not have been reasonably sought in a timely manner. *Cordance Corp.*, 255 F.R.D., 371; *Parker*, 204 F.3d, 340; Fed. R. Civ. P. 16, Advisory Committee Note (1983).

Lee filed his answer to the Amended Complaint on March 26, 2010 (Doc. No. 53) (“Answer”), twenty-two days after the Amended Complaint was filed and four months before the Court’s Scheduling Order deadline, establishing that Lee has the capability to file pleadings with this Court in a timely fashion. Although Lee says his claim for damages hinges on the receipt of the Commission’s response to Discovery, this does not excuse the failure to state the claim during the Court’s appointed window for pleadings.⁵ At best it might show cause for a delay in the calculation of damages, a function traditionally left to the tier of fact, although the link between the Commission answering the Discovery and Lee being able to calculate his damages appears attenuated.

Lee has not provided any compelling argument, or any argument whatsoever, to show an appropriate level of diligence satisfying the “good cause” standard of Rule 16(b). Therefore, Lee’s motion to amend the Scheduling Order should be denied.

⁵ Lee did not even serve the Discovery on the Commission until on or about August 10, 2010 – approximately twenty (20) days after the deadline for motions to amend pleadings.

OBJECTION TO LEAVE TO AMEND PLEADING

Even if the motion to amend the Scheduling Order is permitted by the Court, a motion for leave to amend the Answer should be denied. Lee's Answer was served upon Plaintiffs on or about March 26, 2010. Lee's Answer contained no counterclaims and required no response, and accordingly, Plaintiffs did not file a response or a motion pursuant to Fed. R. Civ. P. 12(b), (e), or (f). Lee may now only amend his Answer with Plaintiffs' written consent or the Court's leave, pursuant to Fed. R. Civ. P. 15(a)(2).

Denial of leave 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); *Castleglen, Inc. v. Resolution Trust Corp.*, 984 F.2d 1571, 1585 (10th Cir. 1993). However, it is well settled in this Court that untimeliness alone is a sufficient reason to deny leave to amend. *Torres v. Cintas Corp.*, 672 F. Supp. 2d 1197, 1205 (N.D. Okla. 2009); *Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1462 (10th Cir. 1991). In addition, when a court considers delay as the basis to deny a motion to amend, a court must consider: (1) the length of the delay and (2) the reason for the delay. *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1285 (10th Cir. 2006). With no adequate explanation for delay, as here, the court may then deny leave to amend. *Torres*, 672 F. Supp. 2d at 1205.

As stated above, Lee's Answer was filed approximately four months before the Scheduling Order's deadline for motions to amend pleadings. Lee never attempted to

amend his answer to include a counterclaim until now – almost six months after filing his Answer. As Lee himself acknowledges in the Pleading, he is aware there are deadlines to meet but has delayed two months past the court imposed deadline before filing the Pleading. Moreover, Lee has advanced no compelling reason why he was unable to timely comply but only states he is experiencing difficulty in calculating, not discovering, damages.

Even if the court rules there is no undue delay, the court should deny leave to amend as it would prejudice the Plaintiffs. Amendments of pleadings should be denied “where prejudice to the opposing party would result”. *United States v. Hougham*, 364 U.S. 310, 316 (1960); *Torres*, 672 F. Supp. 2d at 1205 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Plaintiffs would be prejudiced if the motion to amend was granted because of the impending discovery deadline of October 1, 2010 and the November 8, 2010 Trial Docket schedule imposed by the Scheduling Order. These deadlines do not allow a reasonable opportunity for Plaintiffs to prepare for, or defend against, new claims of damages because of the additional demands on discovery, research and investigation required of the Plaintiffs.

Because of the foregoing, the Court should deny the motion for leave to amend in its entirety.

Relief Requested

For the reasons stated above, and to the extent the Pleading is a motion to amend

the Scheduling Order and/or a motion for leave to amend Lee's Answer, Plaintiffs respectfully move the Court to: (1) deny the Pleading as a motion to amend the Scheduling Order because Lee does not show "good cause," and (2) if the Scheduling Order amendment is allowed by this Court, deny the Pleading as a motion for leave to amend Lee's Answer in its entirety on the basis of undue delay and undue prejudice to Plaintiffs.

Dated: September 30, 2010.

Respectfully Submitted,

/s/ James H. Holl, III

James H. Holl, III

Kevin S. Webb

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CERTIFICATE OF SERVICE

I hereby certify that on September 30th, 2010, I caused the above reply to be served by U.S. mail on the following, who are not registered participants of the ECF System:

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I hereby certify that on September 30th, 2010, I electronically transmitted the above reply to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

James H. Holl, III

Kevin S. Webb

Stephen J. Moriarty

Warren F. Bickford, IV

/s/ Terra Shamas Bonnell
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