UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA J. ANGEL, Plaintiff, v. THE UNITED STATES, Defendant.	)	No. 23-CV-800 (Senior Judge Margaret M. Sweeney)

PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION FOR LEAVE TO AMEND THE COMPLAINT

Pursuant to Rule 15 of the Rules of the United States Court of Federal Claims, Plaintiff Joshua J. Angel ("Plaintiff" or "Angel") respectfully submits this Reply in further support of his motion to amend his complaint.

PROCEDURAL BACKGROUND

Plaintiff commenced this action by filing a complaint on June 1, 2023 ("*Angel IV*" and "*Angel IV* Complaint"). On October 13, 2023, the United States filed a motion to dismiss pursuant to Rules 12(b)(1) and (6) (the "Motion to Dismiss"). On January 23, 2024, this Court denied Plaintiff's motion for leave to take discovery before responding to the Motion to Dismiss. Thereafter, on January 29, 2024, after the United States declined to consent to amendment, Plaintiff filed the instant Motion to Amend the *Angel IV* Complaint. On February 12, 2024, the government filed its opposition.

THERE IS NO PREJUDICE FROM AMENDING THE COMPLAINT

The *Angel IV* Complaint, as filed on June 1, 2023, asserted claims for both illegal exaction and illegal extraction. The proposed amendment clarifies the distinction between these two claims. The proposed amended complaint does not add any new claims.

The United States' opposition to Plaintiff's motion to amend is rather inexplicable. The proposed amendments do not add any claim – they merely clean up a very small number of allegations to clarify that Count II states claims for both illegal exaction and illegal extraction. Regardless of the outcome of the present motion to amend, this Court will still have to consider both claims (as well as all the other claims) when it decides the government's motion to dismiss.[1] While both claims were in the original complaint, the proposed amended complaint is, Plaintiff believes, clearer.

Plaintiff requested the United States consent to the proposed amendment prior to filing the instant motion. Had the government agreed to this, briefing on the anticipated motion to dismiss the amended complaint would be well advanced. Instead, proceedings have been properly but unavoidably stayed pending decision on the motion to amend. Thus, if the government's aim was to move the proceedings to a decision on the merits, opposition to the motion to amend has been counterproductive.

The needless nature of the government's opposition to the motion is underscored by the lack of any appreciable legal basis for the opposition. The United States opposes the amendment on the basis of futility, citing the familiar *Foman v. Davis*, 371 U.S. 178 (1962) and its progeny.

[1] The government's current motion to dismiss is directed at the original Angel IV Complaint, but Plaintiff expects, if the amendment is granted, that the anticipated motion to dismiss the amended complaint will be substantially the same.

However, the futility standard, as argued by the United States in its opposition brief, is inapplicable here. As Plaintiff noted in his moving brief, Rule 15 mandates that leave to amend should be "freely give[n]" and that *Foman* held that "this mandate is to be heeded." *Foman*, 371 U.S. at 182. As stated (correctly) by the United States, Foman also held that a court may deny as futile an amendment that seeks to add a claim where that claim could not withstand a motion to dismiss. *Id*. The government is incorrect in applying the *Foman* futility standard to the proposed amendment here. Here Plaintiff's proposed amended complaint does not add a claim, it merely clarifies existing claims.

The key factor courts examine when considering an amendment that only adds facts and does not seek to assert a new claim is not futility; it is prejudice. *See, e.g., 33 Seminary LLC v. City of Binghamton*, 2012 WL12888394, at *19 (N.D.N.Y April 19, 2012, 11-CV-1300) ("Since there is no evidence of undue prejudice to defendants or dilatory motives by plaintiffs, the Court grants plaintiffs' motion to amend their complaint. Plaintiff's amended complaint does not add any additional claims, but simply include additional facts in support of their arguments on the equal protection claim."); *U.S. ex rel. Rafizadeh v. Continental Common, Inc.*, 2005 WL 2061018 at * 4 (E.D. La. August 2, 2005, Civ.A. 04-1778) (even though proposed factual amendments were "unnecessary and inconsequential," leave to amend should be "freely given" in the absence of prejudice); *Tucker v. Navarro County Sheriff*, 1997 WL 279840, at *2 (N.D. Tex. May 21, 1997, 97-CV-0290) (leave to amend denied where it would add futile claims, but granted where "plaintiff seeks to supplement his factual allegations rather than add new claims" because no prejudice was shown); *English v. General Elec. Co.*, 765 F.Supp. 293, 297 (E.D. N.C. 1991) (amendment denied where it added claims for relief, but granted where the proposed additional

factual allegations "could apply to the currently existing claims" and "no useful purpose would be served by denying leave to amend the factual allegations of the complaint").

The United States has not alleged any prejudice from the proposed amendments but oppose on the ground of futility alone. Because futility is not the standard and no prejudice is shown, the Court should grant Plaintiff leave to amend his complaint as indicated.

Furthermore, it is worth underscoring that it is of no moment whether one finds that the proposed amendments add significantly to the claims asserted. As found in *U.S. ex rel. Rafizadeh*, even when the Court believed the amendments were "unnecessary and inconsequential," the amendments should still be allowed in the absence of prejudice to the defendant. *U.S. ex rel. Rafizadeh*, 2005 WL 2061018 at * 4. The Angel IV litigation is in the very earliest stages. When the Court addresses the government's motion to dismiss, it should be in the context of the amended complaint. There has been no prejudice to the United States alleged from this approach, and there is none.[2]

While in the course of its opposition to the motion to amend the United States expressed some confusion regarding the proper analysis of certain of Plaintiff's claims, a confusion perhaps shared by the Court, Plaintiff respectfully states that whether or not the Court concludes that the

[2] In addition to the analysis under Rule 15(a) of prejudice, or lack thereof, Rule 15(d) should also be considered. One part of the amendments offered by Plaintiff is adding allegations regarding certain announcements made by an agency of the United States Department of Justice since the filing of the original Angel IV Complaint. On August 14, 2023, the United States Attorney for the Eastern District New York issued a press release stating that his office had finalized the disposition of $36 billion in Private Label MBS Actions litigation proceeds recovered from 2013 through 2023. Plaintiff contends that this directly impacts his already-asserted claims and his proposed amendments seek to add allegations concerning this development. As an allegation of new facts arising after the earlier pleading, these allegations qualify for amendment as a supplemental pleading pursuant to Rule 15(d).

amended complaint, or the original Angel IV Complaint, states a viable cause of action is irrelevant to the pending motion to amend. That point will be argued in opposition to the government's motion to dismiss. However, at this time, because no prejudice has been shown the motion to amend should be granted without further consideration of the merits of Plaintiff's claims.

CONCLUSION

For the foregoing reasons, and for those stated in Plaintiff's motion to amend the complaint, the motion should be granted.

Dated: February 16, 2024

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