UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN	§	
	§	
***Plaintiff*,**	§	
	§	
v.	§	**Civil Action No. SA-16-CV-0972-RCL**
	§	
UNITED STATES	§	
DEPARTMENT OF DEFENSE	§	
	§	
Defendant	§	
	§	

PLAINTIFFS' OPPOSED MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

Plaintiff John Eakin, *pro se*, files this Opposed Motion for Leave to File First Amended Complaint which is attached as an exhibit to this motion pursuant to Local Rule CV-7(b). On February 14, 2020, Plaintiff and counsel for Defendant conferred regarding the relief requested in this motion. Defendant's counsel advised by email that Defendant opposes amendment of the pleadings. Plaintiff therefore submits this motion to the Court for consideration and determination.

I. Factual and Procedural Background

This is a Freedom of Information Act case that seeks to obtain records necessary to identify the remains of U.S. Military personnel missing from World War II and buried as Unknowns in overseas cemeteries. To date, Defendants attribute more than 300 such recoveries to Plaintiff's efforts. [1]

Plaintiff first filed suit in 2010, Eakin v. United States Department of Defense et al, SA-10-cv-00784-FB-NSN, and obtained the files that had been digitized to that point. Beginning in 2012, defendant began digitizing additional and overlapping portions of this record collection and ultimately

[1] Statement by AUSA Thorp in court on July 22, 2019

digitized the files with last name initials A thru L. In 2016, Plaintiff filed a second FOIA request which became the basis for this litigation.

The requested files are voluminous, constituting approximately 280,000 "Individual Deceased Personnel Files" (IDPF) and 4.2 terabytes of data. However, to put this in context, these files may be stored on a single portable USB harddrive.

Subsequent to Plaintiff's 2016 FOIA request and commencement of this litigation, Defendants contracted to digitize the second tranche of these files, those with last name initials M thru Z. This contract is well under way and is ongoing. Plaintiff now seeks to amend his complaint to include the balance of the IDPF's created since his original FOIA request.

In this Court's Memorandum Opinion and Order (ECF docs 53 & 54), it was determined that the Court lacked subject-matter jurisdiction over the second tranche of files because Plaintiff had failed to exhaust his administrative remedies. However, the Court further determined that judicial economy would be served if the prior FOIA request was treated as a request for all of the digitized documents. (ECF doc 53 at 8)

On December 18, 2019, Plaintiff submitted a FOIA request to Defendants seeking whatever of the "M-Z" files then existed. (Exhibit 3A to Plaintiff's Proposed First Amended Complaint) On December 20, 2019, Defendant Department of Defense responded to Plaintiff 's FOIA request, having assigned it reference number 20-F-0416. (Exhibit 3B to Plaintiff's Proposed First Amended Complaint). Defendant's response stated that, "we will not be able to respond within the FOIA's 20-day statutory time period as there are unusual circumstances which impact our ability to quickly process your request." Therefore, Defendants have constructively denied Plaintiff's FOIA request and he has exhausted his administrative remedies.

Plaintiff anticipates filing additional such FOIA requests and seeking to amend his complaint at approximate six month intervals as additional files are digitized by Defendant's contractor.

II. Argument and Authorities

A. Legal Standards for Amendment of Pleadings

Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that "a party may amend its pleadings only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." In *Foman v. Davis*, 371 U.S. 178, 182 (1962), the Supreme Court strongly reaffirmed a prior iteration of Rule 15 (a)(2)'s mandate that a district court "should freely give leave when justice so requires."

Over the years, the Fifth Circuit has elucidated and elaborated on *Foman*. In the Fifth Circuit, there is a "presumption in favor of allowing pleading amendments[.]" *Mayeaux v. Louisiana Health Service and Indem. Co.,* 376 F.3d 420, 426 (5th Cir. 2004). Although the district court is given broad discretion to grant or deny a motion for leave to amend, "the district court's discretion does not permit denial of a motion to amend unless there is a substantial reason to do so." *See Lefall v. Dallas Indep. School Dist*., 28 F.3d 521, 524 (5th Cir.1994), *citing Dussouy v. Gulf Coast Inv. Corp*., 660 F.2d 594, 598 (5th Cir. 1981); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.,* 933F.2d 314, 320 (5th Cir.1991). Among those "substantial reason[s]" is undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility of the proposed amendment. *Foman*, 371 U.S. at 182; *see also In re Southmark Corp.,* 88 F.3d 311, 314-15 (5th Cir.1996). "The touchstone for denial of leave to amend under Rule 15(a) is prejudice." *Dueling v. Devon Energy Corp.,* 623 Fed.Appx. 127, 130 (5th Cir. 2015) (*citing Lone Star Ladies Inv. Club v. Schlotzky's Inc.,* 238 F.3d 363, 368 (5th Cir.2001)).

The Fifth Circuit has consistently permitted leave to amended pleadings in keeping with the above precepts. In *Engstrom v. First Nat'l Bank*, 47 F.3d 1459, 1464 (5th Cir. 1995), the Court held that the district court did not abuse its discretion in allowing the plaintiff to amend his complaint, even though the defendant claimed the amendment was futile under the facts of the case. In *Bamm v. GAF Corp*., 651 F.2d 389, 391 (5th Cir. 1981), the Fifth Circuit reversed the district court's denial of leave to amend a complaint because there was no showing of bad faith or dilatory motive on the part of the plaintiff or prejudice to the defendant. *Id*. at 391. In addition, the Court ruled that the district court abused its discretion because discovery was on-going and, while a trial date had been set, it was continued. *Id*.at 391-92. In *Dussouy*, 660 F.2d at598, the Court allowed a plaintiff to amend his pleading after a dismissal and one week before trial. The Court relied on the fact that there was no prejudice involved, and that there is a bias in favor of granting leave to amend. *Id*.

B. <u>The Court Should Grant this Motion for Leave to File Plaintiffs' First Amended Complaint</u>

1. This Motion Promotes Judicial Economy

This Court found (ECF doc 53 at 8) that, "the Defense Department could save time and resources for both itself and the courts if it treated Mr. Eakin's prior FOIA request as a request for all of the digitized documents."

The additional files are virtually identical to those that are the subject of this case. The additional files contain no new or unique features not found in the current files and it is anticipated that no new issues will be presented to the Court. Plaintiff's only alternative would be to file multiple new lawsuits each requiring service and the attendant delay in processing.

As noted above, Rule 15 states that a court should "freely" grant a motion for leave to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). The amendment Plaintiffs request here is in the interest of justice.

2. Amendment of the Complaint Should Not Delay This Case.

Once again, the potential grounds for denial of a motion include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, and undue prejudice to the opposing party." *Dussouy*, 660 F.2d at 598.

Defendant's motion for an *Open America* stay was granted on August 2, 2017 (ECM doc 30 at 2). The Court's deadline for production of the A-L files (ECF doc 29 at 17) is currently nearly one year in the future and Defendants now inform the Court (ECF 58) that, at their current rate of review, they will require at least an additional three years to produce the A-L files (if the Court allows additional time for file review).

Defendant will not be prejudiced by the amendment, but a failure to permit the amendment may result in substantial prejudice to the Plaintiff. As noted above, "[t]he touchstone for denial of leave to amend under Rule 15(a) is prejudice." *Dueling*, 623 Fed.Appx. at 130. There would be no prejudice to the Defendant if the Court grants this motion.

At the same time, "[a]court may weigh in the movant's favor any prejudice that will arise from denial of leave to amend." *Dussouy*, 660 F.2d at 598 (*citing Foman*, 371 U.S. at 182; *Bamm v. GAF*, 651 F.2d 389, 391 (5th Cir. 1981).

While Defendant has conceded that the requested files are not exempt from disclosure under FOIA, they have claimed that a small number of files contain embedded exempt data in the form of prior FOIA requests which were added later and now requiring that each file has to be manually reviewed and redacted as necessary. In their motion for an *Open America* stay, Defendants estimated that the file

review would require forty-eight months to accomplish. In August 2017, this Court ordered the production of the requested files, but granted Defendant's motion for an *Open America* stay until February 1, 2021. (ECF docs 29 & 30) Defendant is making a rolling document production at six month intervals as the file review is completed.

In the most recent status report (ECF doc 57), Defendant reported that after approximately thirty-six months they have produced forty-eight percent (48%) of the subject files. Stated another way, after three-fourths of the time allowed them by this Court, they have produced less than one-half of the documents. At the current rate the files are being reviewed, Defendants will exceed the Court's February 1, 2021 deadline by at least two years.

Defendant has been on notice since 2010 that the subject files are of intense public interest and multiple FOIA requests for these files have been submitted. In 2010 Defendant found that the requested files contained embedded FOIA requests similar to those at issue currently. At that time, Defendants stated that the files contained no exempt material and they were released to multiple requesters without redaction. However, since 2016 Defendant has claimed that these same files do contain exempt material and has insisted on reviewing and redacting them. Therefore, Defendant has been on notice for at least four years and perhaps ten years that these files may contain embedded documents that they now claim are exempt from disclosure. During this time, Defendant has issued new contract(s) for digital scanning of the original documents, a process which requires page by page review of the documents. If Defendant has deliberately continued to include the embedded documents in the digital files being produced, they should not be rewarded by allowing them to further delay release.

III. Prayer

WHEREFORE, Plaintiff respectfully prays that this Court grant Plaintiffs' Motion for Leave to File First Amended Complaint and direct the clerk of court to accept for filing Plaintiffs' First Amended Complaint, attached hereto as Exhibit "1."

Respectfully submitted,

/s/ John Eakin
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Certificate of Service

I hereby certify that on this the 19th day of February 2020, I electronically submitted the foregoing document for filing using the Court's CM/ECF system. All counsel of record shall be served with a true and correct copy of the foregoing document by operation of the Court's CM/ECF system.

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EXHIBITS

Proposed First Amended Complaint w/Exhibits
Proposed Order