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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SUSSEX FINANCIAL ENTERPRISES,)	Case No. 08-4791 SC
INC. ,)	
)	ORDER GRANTING
Plaintiff,)	PLAINTIFF'S MOTION
)	FOR LEAVE TO AMEND
vs.)	<u>COMPLAINT</u>
)	
BAYERISCHE HYPO-UND VEREINSBANK)	
AG, a/k/a HYPOVEREINSBANK; HVB)	
RISK MANAGEMENT PRODUCTS, INC.;)	
HVB U.S. FINANCE, INC., f/k/a)	
HVB STRUCTURED FINANCE, INC.;)	
and DOES 1-100, inclusive,)	
)	
Defendants.)	
_____)	

I. INTRODUCTION

This matter comes before the Court on the Motion for Leave to Amend Complaint ("Motion") filed by Plaintiff Sussex Financial Enterprises, Inc. ("Plaintiff" or "Sussex"). Docket No. 38. Plaintiff attached to the Motion a copy of the proposed First Amended Complaint ("Proposed FAC"). Id. Ex. A. Defendants Bayerische Hypo-Und Vereinsbank AG, HVB Risk Management Products, Inc. and HVB U.S. Finance, Inc. (collectively, "Defendants" or "HVB") filed an Opposition and Plaintiff submitted a Reply. Docket Nos. 44, 46. For the reasons stated herein, the Motion is GRANTED.

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United States District Court
For the Northern District of California

1 **II. BACKGROUND**

2 According to the Complaint, this action concerns a finance
3 program known as Custom Adjustable Rate Debt transactions, or
4 "CARDS." Docket No. 1 ("Compl.") ¶ 6. Under the program,
5 Defendants loaned money to limited liability companies, and
6 clients of Sussex subsequently became jointly and severally liable
7 on the loans in return for receiving fifteen percent of the loan.
8 Id. Sussex received investment banking fees from the CARDS
9 transactions, and Sussex paid Defendants loan origination fees.¹
10 Id. Participation in the transactions was supposed to result in
11 tax benefits for the clients. Id. ¶ 9. In order for the clients
12 to receive those tax benefits, the loans were supposed to be set
13 up and funded in separate accounts in the year in which the loans
14 were made, and all parties to the loans had to have the intent of
15 renewing the loans for thirty (30) years. Id. ¶¶ 11, 15.

16 According to Sussex, Defendants failed to set up the loans in
17 separate accounts in the year in which they were made, and falsely
18 represented that they had done so. Id. ¶¶ 16-17. Sussex learned
19 of these false representations when Defendants entered into a Plea
20 Bargain/Deferred Prosecution Agreement with the U.S. Department of
21 Justice. Id. ¶ 17. Defendants did not renew some of the loans
22 after the first reset period. Id. ¶ 18. Sussex alleges that when
23 Defendants entered into the loans, Defendants did not have the
24 intent to renew the loans. Id. ¶ 18.

25 In the Complaint, Sussex asserts two causes of action: (1)

26 _____
27 ¹ Sussex Financial Enterprises, Inc., was formerly known as
28 Chenery Associates, Inc. Compl. ¶ 3.

1 fraud for failing to properly fund the loans; and (2) fraud for
2 failing to have the intent to renew the loans. Id. ¶¶ 26-35.
3 Sussex seeks leave to add a third cause of action under the
4 Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18
5 U.S.C. §§ 1961, et seq. Mot. at 3.

6
7 **III. LEGAL STANDARD**

8 With leave of the court, a party may amend its pleadings, and
9 "[t]he court should freely give leave when justice so requires."
10 Fed. R. Civ. P. 15(a)(2). This policy should be applied with
11 "extreme liberality." Eminence Capital, LLC v. Aspeon, Inc., 316
12 F.3d 1048, 1051 (9th Cir. 2003). However, district courts may
13 deny amendments that would cause undue prejudice to the defendant,
14 that are sought in bad faith, that are futile, or that would cause
15 undue delay. Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir.
16 1999). Ordinarily, courts will defer consideration of challenges
17 to the merits of a proposed amended pleading until after leave to
18 amend is granted and the amended pleading is filed. Netbula, LLC
19 v. Distinct Corp., 212 F.R.D. 534, 539 (N.D. Cal. 2003)

20
21 **IV. DISCUSSION**

22 Sussex seeks leave to file the Proposed FAC adding a RICO
23 cause of action. The Complaint in this case was filed on October
24 17, 2008, and Defendants answered on January 5, 2009. See Compl.;
25 Docket No. 10 ("Answer"). The discovery cut-off date is December
26 31, 2009, and the case is set for trial on August 2, 2010. See
27 Docket No. 17. Therefore, granting leave to amend will not cause

1 undue delay or prejudice Defendants, and there is nothing to
2 suggest bad faith.

3 Defendants contend the proposed amendments would be futile
4 because (1) adding a RICO cause of action is barred by section 107
5 of the Private Securities Litigation Reform Act ("PSLRA"), Pub. L.
6 No. 104-67, 109 Stat. 737, 758 (1995), which amended the RICO
7 statute to eliminate securities fraud as a predicate act upon
8 which to base a RICO claim; and (2) the Proposed FAC fails to
9 plead the RICO cause of action with the requisite particularity.
10 Opp'n at 2.

11 As amended by the PSLRA, the RICO statute provides that "no
12 person may rely upon any conduct that would have been actionable
13 as fraud in the purchase or sale of securities to establish a
14 violation of [the RICO statute]." 18 U.S.C. § 1964(c). The Ninth
15 Circuit has dismissed RICO claims in tax shelter cases that are
16 based upon acts that are actionable as securities fraud. Swartz
17 v. KPMG LLP, 476 F.3d 756, 761 (9th Cir. 2007). Here, both the
18 Complaint and the Proposed FAC focus on the CARDS program. See
19 Compl. ¶¶ 6-25; Proposed FAC ¶¶ 6-25. It is not clear to the
20 Court that the CARDS program involved the purchase or sale of
21 securities. At this particular stage of the proceedings, the
22 Court is not persuaded that the proposed amendment is futile due
23 to the PSLRA.

24 Defendants contend the Proposed FAC fails to plead the RICO
25 cause of action with the requisite particularity. Opp'n at 5.
26 The particularity requirement must be followed in RICO actions
27 alleging the predicate act of mail fraud. Lancaster Cmty. Hosp.

1 v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405 (9th Cir. 1991).
2 A plaintiff satisfies the particularity requirement if it
3 identifies "the circumstances constituting fraud so that the
4 defendant can prepare an adequate answer from the allegations."
5 Semegen v. Weidner, 780 F.2d 727, 735 (9th Cir. 1985)(citations
6 omitted). Here, the Court finds that HVB can prepare an adequate
7 response to the RICO cause of action based on the allegations in
8 the Proposed FAC relating to HVB's allegedly fraudulent
9 involvement in the CARDS program. See Proposed FAC ¶¶ 6-25. At
10 this particular stage of the proceedings, the Court is not
11 persuaded that the proposed amendment is futile due to a failure
12 to plead the RICO cause of action with the requisite
13 particularity.

14
15 **V. CONCLUSION**

16 For the reasons stated above, the Court GRANTS Plaintiff's
17 Motion for Leave to Amend Complaint. The Proposed FAC must be
18 filed within thirty (30) days of this Order.

19
20 IT IS SO ORDERED.

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22 Dated: July 1, 2009

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UNITED STATES DISTRICT JUDGE